

TRANSCRIPT OF PROCEEDINGS

COURT OF THE DISTRICT OF COLUMBIA

IN SENATE BUILDING

No. 1000

IN CASE OF THE UNITED STATES OF AMERICA
PLAINTIFF
VS
JOHN W. WHEELER & COMPANY
DEFENDERS

THE COURT OF THE DISTRICT OF COLUMBIA
DOES hereby certify that the foregoing is a true and correct
transcript of the proceedings in the above entitled case.

WITNESSED my hand and the seal of the Court at Washington
this 10th day of June 1900.

JOHN W. WHEELER & COMPANY

(SIGNED)

(22,582)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 547.

EL PASO & SOUTHWESTERN RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

EICHEL & WEIKEL, A FIRM COMPOSED OF WILLIAM
EICHEL AND ADAM WEIKEL.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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Caption.

THE STATE OF TEXAS,
County of El Paso:

At the term of the District Court, 41st Judicial District, begun and holden within and for the County of El Paso, at El Paso, on the 1st day of March, A. D. 1909, and which adjourned on the 1st day of May, A. D. 1909, the Hon. A. M. Walthall, Judge thereof, the following case came on for trial, to-wit:

First Amended Original Petition.

(Filed Feb. 20, 1909.)

In the District Court of the 41st Judicial District in and for El Paso County, Texas, January Term, A. D. 1909.

No. 6840.

EICHEL AND WEIKEL, Plaintiffs,

vs.

EL PASO & SOUTHWESTERN RAILROAD COMPANY, Defendant.

Now in the above styled and numbered cause come plaintiffs, and with notice and leave of the Court, file this their first amended original petition in lieu of plaintiffs' original petition heretofore filed herein on the 23rd day of December, A. D., 1907, and for amendment say:

Your petitioners, Eichel and Weikel, a firm composed of William Eichel and Adam Weikel, herein styled plaintiffs, complaining of the El Paso & Southwestern Railroad Company, hereinafter styled defendant, respectfully show to the Court that plaintiffs are residents and citizens of the State of Indiana, and that defendant is a railroad corporation incorporated under the laws of the Territory of Arizona, and is a citizen of said Territory but has its principal office
 2 and place of business in the City and County of El Paso and State of Texas, and that H. J. Simmons is the General Manager of said corporation and resides in said El Paso County, Texas.

That heretofore, to-wit prior to the 1st day of November, 1905, plaintiffs were engaged in quarrying and crushing stone and furnishing ballast in the State of Indiana; that defendant, who was operating a railway through the Territory of New Mexico, and El Paso County in this state and the Territory of Arizona, desired to procure a contract for the furnishing of ballast from the quarries of defendant at Tecolote in said Territory of New Mexico, by means of a plant and other facilities to be furnished by defendant, applied to these plaintiffs to bid upon said proposition. Said defendant acting through its duly authorized agent J. L. Campbell, on or about the

25th day of Oct. 1905, and at various times before and since said date, as an inducement for plaintiffs to bid on said contract, then and there represented to plaintiffs, who were ignorant of the facts, that the climatic conditions existing at said Tecolote in said Territory of New Mexico were mild and equable so that the work and labor of crushing the ballast contemplated by such contract, could be carried on without interruption throughout the year, and that ballast could be produced with the plant, coal, water and other facilities to be furnished by defendant in such contract, at thirty cents a cubic yard.

Plaintiffs show to the court that as a matter of inducement to plaintiffs to make a low bid for the production of ballast for defendant, that defendant agreed to have transported the certain machinery and equipment of the plaintiffs over the Rock Island Railroad to Tecolote at a cost to these plaintiffs of twenty five per cent of the regular freight rate on such material and equipment; that thereafter, and without any authority from these plaintiffs, and without their consent the defendant arbitrarily and wrongfully deducted and withheld from the monies coming to these plaintiffs, and earned

3 by them under said contract, an amount of money equivalent to the total, regular freight rate on such material and equipment, to-wit: the sum of \$2233.16; that such charge and deduction was without legal right or authority and wrongfully deprived and withheld from plaintiff the sum of \$1674.87 lawfully coming to them under said contract for which they pray judgment.

That instead of the climate at said Tecolote being mild and equable so that the process of furnishing said ballast could be carried on uninterruptedly throughout the year, as represented by said Campbell, and which was relied upon by plaintiffs in bidding upon and entering into said contract with defendant, the weather throughout the winters at various times was so harsh and severe, with sleet, snow, ice and low temperature, as to entirely prevent operations in the production of said ballast; and at other times to greatly diminish the production thereof. That during the winters of 1906 and 1907, whilst plaintiffs were engaged in the performance of said contract, they were forced to suspend operations entirely on account of the inclemency of the weather for — days, as shown by schedule hereto attached and marked "Exhibit W 1." That they during said intermission were compelled to pay their employes 690.56 Dollars as is also shown by said exhibit, to their damage in the sum of 690.56 Dollars, for which sum they pray judgment.

That plaintiffs under said contract having agreed to extract and produce from defendant's quarry and deliver to defendant on its cars, from two hundred thousand to three hundred thousand cubic yards of ballast, defendant among other stipulations in said contract, agreed with plaintiffs as follows. That it would deliver to them for the purpose of crushing stone from its said quarry "one complete crusher plant ready for operation consisting of one No. 7½ and one No. 5 gyratory Austin crusher, one ballast pin, one engine and one boiler plant, this entire crusher plant to be erected complete at the quarry and capable of crushing one thousand yards of ballast in ten hours; also two No. 3½ steam drills, one steam

4

boiler with steam pipe and steam hose for drilling the quarry, one small Duplex pump with pipe connection for water supply"; also "all coal, water and railroad cars necessary to run the entire quarry and crusher equipment at the rate above specified for the daily output of ballast." Defendant then and there with reference to said crusher plant, stipulated in said contract that the maximum capacity of said crusher plant to be furnished said plaintiffs by defendant should be one thousand cubic yards of ballast crushed in ten hours. That with reference to said stipulations on behalf of defendant as well as to other stipulations in said agreement contained, defendant made default and failed to perform same. That notwithstanding defendant's agreement that said "entire crusher plant should be erected complete at the quarry and capable of crushing one thousand yards of ballast in ten hours," the same was neither complete nor capable of crushing said amount of ballast, that it was so improperly housed and the engine so improperly mounted and said plant was otherwise so incompletely erected that plaintiffs at great cost and expense, in order to perform their part of said contract, were compelled to repair said deficiencies and add to the plant that it was defendant's duty to furnish, to their expense and damage as will be hereinafter more particularly shown. That though defendant contracted to furnish plaintiffs with a complete crusher plant capable of crushing one thousand yards of ballast at its quarry in ten hours, the plant so furnished was not of said capacity and was incapable of crushing even six hundred yards of ballast in ten hours, from the stone of defendant at its quarry and with the coal and water as furnished by defendant. That with said crusher plant of said diminished capacity, and with coal entirely unsuitable for the purpose,

5 purpose, which had to be screened and the slate and other refuse matter separated therefrom, and with water impregnated with alkali, minerals and other foreign substances and in other ways unsuitable, to such an extent as to cause foaming in the boilers and to be entirely unsuitable to produce steam or dry steam in sufficient quantities to furnish the power necessary for said crusher plant, on which account plaintiffs found it impossible to profitably crush said stone, but were put to great expense through the default of defendant with reference to the furnishing of said facilities, and lost large sums of money. That though with proper climatic conditions as represented by defendant, and with suitable plant, coal, water etc. as agreed to be furnished by defendant, plaintiffs could have produced ballast so as to have made a large profit at the rate bid by them, that through the inclemency of the weather, the furnishing of an entirely inadequate plant, and unsuitable coal and water by defendant, they were required to spend large sums of money to overcome defects so resulting through defendant's default in furnishing suitable plant, appliances and facilities under said contract, and Plaintiffs operated under said contract and produced ballast for defendant at great loss and to their damage as will hereinafter more particularly appear.

That on or about the 13th day of December, A. D. 1905 (erroneously stated in the written contract hereinafter described as December 13th, 1906) the defendant entered into said written contract

with these plaintiffs for the supply by these plaintiffs to said defendant of a certain quantity of rock and other material for ballast, all of which will more fully appear from the terms of said written contract, a copy of which is attached to this petition and marked "Exhibit 1," and reference is hereby made — the same for its contents, and the same is hereby made a part of this petition.

6 That upon entering into said contract plaintiffs were instructed by defendant that they must prepare to proceed to Tecolote for the purpose of carrying out said contract upon notice from defendant, defendant agreeing to notify plaintiffs when its plant would be ready for operation. That plaintiffs did prepare to proceed to Tecolote and on the 20th day of January, in response to telegrams and letters from J. L. Campbell, the authorized agent of the defendant, advising them so to do, the plaintiffs proceeded to Tecolote with a working force consisting of about thirty skilled employes, arriving there on or about the 23rd day of January, 1906. That the said communications of the said J. L. Campbell represented that the plant would be in readiness to be taken over and operated by the plaintiffs by the last named date upon their arrival. That in fact the said plant was not ready for use when the plaintiffs and their employes arrived at Tecolote and that several weeks passed before the said plant was ready for operation, and that in fact the same was not ready for operation until the 16th day of February, 1906, for the reason that the construction of said plant was not completed or ready for use until said last named date. That by reason thereof plaintiffs were compelled to pay their employes for their time during said dates to-wit: one man 4.16 $\frac{2}{3}$ Dollars, one man Three Dollars, one man three Dollars per day making a total of 10.16 $\frac{2}{3}$ Dollars per day for 16 days, from the 23rd day of January, 1906, to the 16th day of February, 1906, making a total of 162.66 Dollars for detailed statement see Exhibit "A" for which plaintiffs pray judgment. Plaintiffs further represent that after taking over and undertaking to operate said plant, they were further delayed by reason of the fact that the crusher hoppers and concaves had not been properly set which caused the head and shaft to rise in the hopper causing slow feeding, so that it was twice necessary to re-set them before they could be made to work properly and that thereby

7 plaintiffs were delayed half the time from March 18th, 1906 to April 7th, 1906, causing an average loss of \$40.00 per day for 17 days, to their damage in the sum of \$680.00 for which they pray judgment, and by reason of other changes that had to be made after plaintiffs and plaintiffs' employes arrived at the quarry, the greater part of plaintiffs' working force was compelled to be idle at the expense of these plaintiffs, who were under contract to pay said men by the day, to the damage of these plaintiffs in the sum of \$319.19 and in the manner hereinafter more particularly stated. (See Exhibit B.)

That by virtue of said contract, defendant in consideration of plaintiffs' agreement to furnish ballast at the price agreed upon and to enable plaintiffs to do so, agreed and bound itself by said contract to furnish to the plaintiffs rock crushers, ballast bin, engine and boiler plant, comprising an entire crusher plant capable of

crushing one thousand yards of ballast in ten hours at the quarry of defendant, together with steam drills, steam boiler, with steam pipe and steam hose for drilling the quarry, a Duplex pump with pipe connected with water supply, and also agreed in and became bound by said contract to deliver to plaintiffs all coal and water necessary and suitable for the purpose of crushing said thousand yards of ballast in a day as aforesaid. That though plaintiffs fully complied with their said contract except to the extent that they were prevented from so doing by defendant's default as hereinafter mentioned, the defendant did not comply with its said contract by furnishing to plaintiffs the crushing plant, water and coal as herein last above mentioned, but so faultily performed its duty under said contract and furnished plaintiffs such inadequate, insufficient and faulty crusher plant, coal and water for the performance of plaintiffs' duties that plaintiffs, so far from being able to make any profit out of said contract, lost large sums of money in attempting to perform the same and were put to great cost and expense in supplying the deficiencies resulting from defendant's default, and were

8 put to great additional cost and expense in attempting to perform the work and carry out plaintiffs' agreement, through defendant's default as aforesaid to their damage as is herein-after more particularly shown.

That the house or shelter provided by defendant for said crusher plant, which was really a part thereof and was necessary for the protection of said plant as well as for the proper performance of said work, was but a slight board shanty, inadequate to protect said plant from the weather, which the plaintiffs discovered after entering upon said contract, was variable and subject to cold, strong winds and heavy snows; that the said house or structure was not properly constructed so as to protect from the heavy dust of the ballast bins and screening department, the engine room, which was necessary, not only to the successful operation of said plant, but in the preservation of the engine furnished by defendant, and that plaintiffs were compelled at their own cost to remedy these defects as best they could by covering the thin partitions with heavy sheeting at their own expense, to their damage in 80.25 Dollars. (See Ex. D).

That the boiler plant and engine plant were not properly constructed in this. That the brick casing and setting for the boilers was constructed in freezing weather and froze while in course of construction, and that the effect of said freezing was to greatly weaken said construction, and caused the same to crack, disintegrate and shake to pieces when said plant was put in operation, thereby necessitating heavy repairs to be made by plaintiffs at their own expense, which would not have been necessary had such foundation and casing been properly constructed in the first place, and in addition thereto the wear and tear on the plant would have been much less than it actually was; and were compelled and did cause the defective masonry to be repaired at a cost and expense to them of 150.00 Dollars, to their damage in said last named sum.

9 These plaintiffs further show to the court that by virtue of the terms of said written contract the defendant agreed to furnish to plaintiffs, without charge to them, "all coal, water and railroad cars necessary to run the entire quarry and crusher

equipment at the rate in said contract specified for the daily output of ballast," that is for an output of one thousand yards per day and at all events an average output of seven hundred and fifty yards per day; but plaintiffs aver that the coal and water furnished to them by defendant was of an inferior quality, and wholly insufficient for the purposes for which it was supplied by defendant; that at times defendant wholly failed to supply any water for the operation of said plant, thereby necessitating the suspension of operations and consequent loss of time and extra expense to plaintiffs. That the coal was often full of slate, dirt and refuse, and required to be screened, at an extra expense to plaintiffs, as hereinafter set out, and that same did not burn properly even when screened, and that the water furnished to plaintiffs foamed in the boilers so badly that it was continually lifted over into the engines from the boilers and impeded the operation of the engines and caused such a great loss of steam and power and such great danger of boiler explosions that plaintiffs' operatives were frequently compelled to slow down and stop said plant, to plaintiffs' great damage in loss of time, as hereinafter set out. That the water would foam in the boilers of the dinkey engines which were used for hauling stone from the quarry to the crushers until it would be impossible to run the dinkey engines up the incline from the quarry to the crushers, and frequently repeated runs would have to be attempted before it was possible to generate sufficient power to run the engine up the slight incline. That the trouble with the water was due to the defective quality of the same, and was well known to the defendant from its own experience with said water, but was wholly unknown to plaintiffs when they bid on said contract and entered into the same, and in addition thereto that these plaintiffs made frequent and at times almost daily complaints of said water, and that very frequently if not every day W. Harrison, the representative of defendant, and others reported to defendant the defective quality of the water and the fact that the same was foaming in the boilers, and that many hours of time were being lost in the operation of the plant, and that the same was frequently delayed and stopped, all of which information was repeatedly laid before the defendant, not only by these plaintiffs, but by the agent and representative of the defendant at the plant, that complaints were likewise repeatedly made by plaintiffs and defendant's representatives to defendant in regard to the quality of the coal furnished for the operation of the plant; that repeated demands were made by plaintiffs to the defendant for suitable coal and water, notwithstanding which in many instances improper coal was supplied, and the trouble *was* with the water, as above outlined, was almost continuous. That by reason of the facts above complained of, the plaintiffs were unable to operate the plant steadily or effectively; that frequent delays were caused, resulting in the loss of much time by plaintiffs and their employes in their being compelled to resort to various expedients, at their own expense, to minimize said difficulties and prevent loss, all of which is hereinafter more particularly set out. That by reason of the bad water and coal furnished as aforesaid, and also on account of the original improper construction of the plant, and by reason of being required

to overwork the same, that plaintiffs were put to excessive expenses for repairs, and much more time and money was expended in repairs than would have been necessary but for the aforesaid wrongful acts of the defendant. (See Exhibit E). That during the season of 1903, sixteen hundred and twenty-six extra hours' work of laborers had to be expended on the crusher plant in repairing the same at a cost of twenty-five cents per hour, to plaintiffs' aggregate cost of four hundred and six dollars and fifty cents, as shown by exhibit attached hereto and marked "L 1."

That by reason of the aforesaid facts, and during the season of 1906, fourteen hundred and fifty-five and a half hours of extra time of laborers was employed on the steam shovel, at fifty cents per hour, aggregating an extra expense to these plaintiffs of two hundred and twenty-seven dollars and seventy-five cents, as shown by exhibit attached hereto and marked "L 2." That during the same season six hundred and thirty-nine and a half extra hours *was* necessitated by reason of the aforesaid facts, in and about the repairing and operating of said plant, at a cost of thirty cents per hour to plaintiffs, aggregating an extra expense of one hundred and ninety-one dollars and eighty-five cents, as shown by exhibit attached hereto and marked "L 3." That during the season of 1907, fourteen hundred and sixty-seven hours of extra work were expended in repairing the crusher, at a cost of twenty-five cents per hour to the plaintiffs, aggregating an expense of three hundred and sixty-six dollars and seventy cents, as shown by exhibit attached hereto and marked "L 4." That nine hundred and forty-one and a half extra hours of work were necessitated on the steam shovel, at an expense of fifty cents per hour, aggregating four hundred and seventy dollars and seventy-five cents, as shown by exhibit attached hereto and marked "L 5." That in general extra work on said plant and quarry during said season of 1907, three hundred and eighty-nine and a half hours were necessitated, at a cost of twenty cents per hour to plaintiffs, aggregating a cost of seventy-seven dollars and ninety cents, as shown by exhibit attached hereto and marked "L 6." That by reason of the injuries to said boiler and engine from the quality of the water furnished to plaintiffs, they were required, on various dates to wit: on or about Feb. 1st-June 27th, 1907, to have an extra boiler maker to wit one — Luten come to Tecolote to repair same at an aggregate cost of two hundred and fifty dollars to plaintiffs. All of which said extra expenses, aggregating nineteen hundred and ninety-one dollars and fifty cents, were rendered necessary by reason of the aforesaid wrongful acts of the defendant, hereinabove complained of, and its failure to comply with its said contract, and without fault or negligence on the part of the plaintiffs, and

12 plaintiffs pray judgment for said sum. That by reason of the bad water and bad coal furnished, the plaintiffs were obliged to install on the steam shovel an extra boiler at an expense of \$1024, for which they pray judgment (See Ex. F), and thereby were required to furnish the services of an extra foreman. That had the water and coal been of a suitable quality for such work, the boiler on said steam shovel was amply sufficient to have furnished the necessary power. That by reason of the water and coal being of bad

quality plaintiffs were compelled to pay for extra labor on said shovel for said extra fireman three dollars per day for eighty-five working days from July 8, 1907, to Oct. 25, 1907, aggregating an expense of two hundred and fifty-five dollars, for which sum they pray judgment. That plaintiffs were compelled to screen the coal furnished them at certain times, in order to remove the slate, refuse and dirt therefrom, and that therefore they were compelled to pay at the rate of two dollars per day for seventy-eight days, from April to Oct., 1907, seventy-eight days, aggregating an extra expense of one hundred and fifty-six dollars, for which they pray judgment. That the plaintiffs had prepared and arranged an apparatus for the dumping of stone cars at the crusher by means of power from the crusher plant, but by reason of the insufficiency of said plant and its failure to generate sufficient power for the proper operation of the plant itself, they were compelled to dump said cars by hand, and that the dumping by hand required the additional service of four Mexican hands at one dollar and a half each per day, for one hundred and seventy-seven days, from Apl. 1st, 1907, to Oct. 25th, 1907, aggregating an extra expense to plaintiffs of one thousand and sixty-two dollars, which would not have been necessary except for the wrongful failure of defendant to supply a proper plant, fuel and water, as above set out, and for which sum plaintiffs pray judgment.

13 Plaintiffs further represent to the Court that about the beginning of the month of Sept., 1906, on account of the limited output of the crushers during the day time (which limited output was due to the incapacity of the crusher plant, and the inferior quality of the water and coal) at the earnest request of the defendant through its General Manager, H. J. Simmons, and its Chief Engineer, Campbell, these plaintiffs undertook and attempted to operate said quarry and crushing plant in the night time as well as the day, being moved thereto by the urgent demand of the defendant and the contention on the part of the defendant that the plaintiffs were not complying with the contract as to the amount of the daily output of ballast. That in response to such demand of defendant the plaintiffs installed a dynamo and the necessary machinery and electric wiring to illuminate the plant and quarry for this night work at the total and reasonable cost to these plaintiffs of about six hundred —, for which sum of six hundred dollars they pray judgment. That the plaintiffs then undertook to operate said crusher plant for twenty consecutive hours out of the twenty-four, but the strain on the machinery and crusher plant if required to do this double amount of work was so great that instead of giving a fair day's average work therewith as plaintiffs had been doing, that the average daily output of ballast actually declined. Plaintiffs say that such attempt to operate the crusher plant for twenty consecutive hours was a total failure on account of the injury to the plant from overstrain, it being necessary to utilize the night time for repair of the plant after the day's work, and if the plant was operated at night it became necessary to repair it on the succeeding day.

That under the provisions of said contract defendant agreed to make payments to plaintiffs after such ballast began to be delivered to

it by plaintiff- under said contract, on the 20th day of each month, it being agreed that the defendant might retain ten per cent of the amount due to plaintiffs until the whole of the ballast required under the terms of said contract should have been delivered. That though the total amount of said ballast was not delivered to defendant by plaintiffs, that the failure to so deliver the total amount of said

14 ballast and the final closing down of said plant resulted through no fault of these plaintiffs, but resulted wholly through the fault, wrong and breach of contract of defendant as hereinbefore stated. Wherefore plaintiffs are entitled to the percentage retained by defendant. That there was retained by the defendant in said percentage the aggregate sum of ten thousand nine hundred and five dollars and sixty-two cents, which after the closing down of said plant was demanded of the defendant by plaintiffs, but which the defendant refused to pay and which is now due plaintiffs as shown by the several certificates of the engineer furnished from time to time, showing the amount of ballast furnished and percentage retained, for which plaintiffs pray judgment, with interest at the rate of six per cent per annum from the 23rd day of December, 1907, until paid.

And plaintiffs say that on or about to-wit: the 29th day of December, 1907, plaintiff, William Eichel, called upon H. J. Simmons, general manager of the defendant company, for the amount of such retained percentage and demanded payment thereof, but that the defendant, acting through said H. J. Simmons, absolutely and unconditionally refused to pay such sum or any part thereof.

Wherefore, premises considered, the defendant being already in court, plaintiffs pray judgment for the sum of — Dollars and for costs of suit and general relief.

Plaintiffs further respectfully show to the Court that soon after arriving at the quarry, and after putting said crusher plant in operation, they became convinced that the plant had not the capacity of one thousand yards a day, as guaranteed by defendant, nor did the said plant have an average capacity for an actual output of seven hundred and fifty yards per day of ballast, nor of even six hundred yards per day. And your petitioners respectfully represent that they laid this matter fully before the defendant and its agents, in writing and orally, and requested and demanded that they be furnished with

a crusher plant capable of performing the work required of plaintiffs under the contract, but that defendant refused to supply said adequate plant, and insisted that the plant which it had furnished to plaintiffs was a thousand yard plant, and demanded of plaintiffs that they proceed without delay and without intermission with the operation of said plant, and threatened to penalize plaintiffs under the terms of said contract, and did actually penalize plaintiffs, and did deduct and withhold from the moneys owing to plaintiffs, penalties for plaintiffs' failure to supply the amount of ballast stipulated in said contract, to wit, not less than six hundred yards per day, all of which was done over the protest of plaintiffs, and in utter disregard of plaintiffs' rights under said contract, and in disregard of defendant's promises and obligation to sup-

ply a thousand yard plant, and to the damage to these plaintiffs, as is hereinafter more particularly set out. That penalties were improperly deducted and withheld from plaintiffs for the supply of less than six hundred and fifty yards per day, as follows, to-wit: that five hundred and eighty-nine yards were paid for at thirty-nine cents, that two thousand and forty yards produced on several different days were paid for at forty cents, that nine thousand six hundred and five and a half yards produced on different days were paid for at forty-one cents, that eight thousand eight hundred and a half yards produced on different days were paid for at forty-two cents, that twenty-one thousand one hundred and twelve and a half yards produced on different days were paid for at forty-three cents, that twenty-nine thousand five hundred and fifty-three yards produced on different days were paid for at forty-four cents; that the failure to produce the required amount under said contract in each and every instance was due to the default of defendant in failing to supply a proper plant and proper coal and water, as herein complained of, and were not in any sense due to the fault of these plaintiffs, and that the amount of money wrongfully deducted and withheld from plaintiffs by defendant therefor amounted to the sum of fifteen hundred and three 16 dollars and thirty-four cents, for which sum they pray judgment.

Plaintiffs respectfully show to the Court, that after months of earnest but ineffectual effort to work the plant and equipment to the capacity required by plaintiffs, or even to the capacity of six hundred and fifty yards per day, defendant itself became convinced from experiment, and likewise from letters obtained from the manufacturers of the crushing plant by plaintiffs and exhibited by them to defendant, that the said plant furnished by defendant was not a thousand-yard plant, and was not capable of producing a thousand yards per day, nor even six hundred and fifty yards per day, nor even six hundred yards per day, on an average, and that if same, by extra exertion was worked up to the smaller limit, that is, six hundred yards in a day the plant would be so overtaxed and injured thereby as to necessitate its repair before being used for further work, thereby necessitating extra delay and expense, and that in any event, whether convinced of the aforesaid facts or not, the defendant did agree to install a plant capable of producing the required amount of ballast per day. That they conferred with these plaintiffs in regard thereto, and agreed to furnish an adequate crusher plant, as it had originally contracted so to do, and agreed to add an additional boiler, crusher, etc., and that plaintiffs called the attention of defendant to the fact that it would be necessary to provide additional boiler and engine power for said plant when the crusher capacity was enlarged and that defendant agreed to increase the boiler and engine capacity and crusher capacity of the plant, so that the same would fulfill the requirements of defendant's original contract and guarantee, and so that the same would produce the required amount of ballast per day, that is to say, one thousand cubic yards per day; and further agreed with plaintiffs that if said plant, with the capacity increased as aforesaid, was

not ready for operation by October 1st, 1906, that in that event
17 defendant would pay to plaintiffs at the rate of sixty cents
per yard for all ballast furnished thereafter until said capacity
of said plant had been increased as aforesaid. That said negotiations
were verbal and between Wm. Eichel and Mr. H. J. Simmons and
resulted in a verbal agreement as herein stated, at office of Mr. Sim-
mons in El Paso about the 1st of Aug., 1906. That in fact the capac-
ity of said plant was not increased by the said date, to-wit, October
1st, 1906, and not in fact until several weeks afterwards, was any
increase made therein, and during said term the plaintiffs earned an
additional amount of nineteen hundred and thirty-four dollars and
fifty-six cents under said increased price per cubic yard. That in
pursuance of said agreement defendant afterwards paid plaintiffs
one half of said sum of nineteen hundred and thirty-four dollars and
fifty-six cents, but arbitrarily, wilfully and wrongfully refused and
still refuses to pay plaintiffs said remaining sum of nine hundred
and sixty seven dollars and twenty-eight cents, although the defend-
ant was wholly without authority, either by the terms of said written
contract or by any agreement or authority from plaintiffs, to with-
hold or deduct said moneys, and they pray judgment for said sum
of nine hundred and sixty-seven dollars and twenty-eight cents, and
interest from January 1st, 1907.

That in the month of November, 1906, the defendant installed at
said plant an additional crusher and ballast bin and screen, and
thereby increased the capacity of said plant to produce the requisite
amount of ballast, provided said plant had then been equipped with
sufficient motive or boiler and engine power, and defendant had fur-
nished good and sufficient coal and water to operate with as agreed
by defendant, but that the defendant wholly failed and refused to
correspondingly increase the boiler and engine power of said plant,
although complaint was immediately and repeatedly made by plain-
tiffs of the insufficiency of said boiler and engine power, but

18 defendant insisted and demanded that plaintiffs proceed with
the operation of said plant, and that they make no complaint
of the insufficiency of same until they had proved it. That there-
upon these plaintiffs did operate said plant as best they could, and
in order to comply with the contract and minimize the loss that would
result from shutting down the plant and discharging the employes
they worked night and day in the effort to get the required amount
of work out of the plant, operating the plant by day and repairing it
at night, and they say that by reason of the insufficiency of the boiler
and engine power for the operation of the three crushers it was nec-
essary to overwork the engine, which tended to jar and injure and
wear out the machinery, thereby necessitating heavy bills for repairs
and great expense to plaintiffs, as has been hereinbefore more partic-
ularly set out.

Plaintiffs show to the Court that Tecolote is situated about one
hundred and seventy-five miles from El Paso, in a very sparsely set-
tled country, and that it is impossible to secure employes and opera-
tives to operate the quarry and crushers at or near there, and that it
was necessary to obtain same at El Paso, and therefore these plain-

tiffs were compelled to keep the men employed by them, and to pay them their wages from day to day, notwithstanding plaintiffs' inability to operate the plant continuously as above complained of, otherwise it would have been impossible to operate the plant for want of men when the same were ready for operation. Plaintiffs aver that notwithstanding all their complaints of the insufficiency of the boiler power and engine power to operate said plant, and their repeated demands for additional boiler and engine power, that the defendant ever failed and refused to provide the same; that in order to operate said crusher plant it was necessary for plaintiffs to use a boiler of their own which they had bought and provided for operating the drills in the quarry, to assist in operating the crusher plant, and that thereby they were prevented from operating the said drills in the quarry with the use of their own boiler bought for the purpose, during

19 the day, and were frequently compelled to use their boiler to work said drills at night; that such night work prevented the actual failure of the stone supply from the quarry, and thereby prevented a much greater loss than the cost of such night work entailed, but, nevertheless, such night work cost a considerable additional expense to these plaintiffs, which was incurred by them in the effort to operate said plant as economically as possible, and that by reason of defendant's failure to supply sufficient boiler and engine power, as it had agreed to do, and thereby necessitating the use by plaintiffs of their own boiler to assist the crusher plant by day and necessitating night work in the quarry, these plaintiffs were put to an additional expense, without fault on their own part, as is herein more particularly stated. That they were compelled to pay for extra services of one extra fireman to fire the compressor boiler to assist in the operation of the crusher plant, three dollars per day for one hundred and fifty days from May 4, 1907, to Oct. 25, 1907, aggregating an extra expense of four hundred and fifty dollars, for which they pray judgment. That by reason of being compelled to use said boiler of their own in the operation of the crusher plant, and thereby having no air to operate the drills in the quarry, they were required to employ the additional services of one extra man for said work, at three dollars per day, for seventy-eight days from July 27, 1907, to Oct. 25, 1907, aggregating an extra cost of two hundred and thirty-four dollars, for which they pray judgment. That by reason of the extra work necessitated by night drilling between June 27, 1907, and Oct. 25, 1907, the plaintiffs were compelled to pay out for each and every night an expense of about eighteen dollars and sixty-five cents daily, divided as follows: For services in supplying one extra meal at midnight, including services of cook, five dollars; for services of one extra fireman for night work, three dollars; for services for one extra compressor engineer, three dollars; for one boss, four dollars, for

20 one extra blacksmith, six hours work daily, two dollars and ten cents; for one extra Mexican hauling water to drills for night work, one dollar and a half. That it was necessary to work at night in the quarry in this night drilling for ninety days, from June 27, 1907, to Oct. 25, 1907, at an expense of eighteen dollars and sixty-five cents daily, aggregating an expense of sixteen hundred and sev-

enty-eight dollars and fifty cents, for which they pray judgment. That likewise, by reason of being compelled to use the compressor boiler to operate the crusher plant, thereby preventing its use for drilling in the quarry, plaintiffs were compelled to do a large amount of extra adobe blasting with dynamite, thereby necessitating extra expense; that thereby an average of sixty doby shots per day were necessitated for eighty-three days, from June 28, 1907, to Oct. 25, 1907, that sixty doby shots required seventy-five pounds of dynamite per day extra, at twelve and two-tenths cents per pound, making nine dollars and fifty-three cents per day, and aggregating seven hundred and ninety dollars and ninety-nine cents, for which they pray judgment.

These plaintiffs further show to the Court that the actual horse-power of the boiler of the plant furnished by defendant to plaintiffs is about one hundred and sixty horse-power, and that the actual horse-power of the engine is about one hundred and thirty-five horse-power, but that the requisite power to properly operate said plant exclusive of the air compressor would have been not less than two hundred and seventy-five boiler horse-power and not less than two hundred and fifty engine horse-power. They further show that after the installation of the third crusher, the crushing plant was not such a plant as defendant had agreed to install and guaranteed to furnish, in this, that by furnishing three separate crushers, with additional screens and bins, defendant necessitated plaintiffs providing additional men to operate said plant, at greatly increased cost to plaintiffs, as is more fully hereinafter set out. That by reason of said facts last above stated, plaintiffs were compelled to employ for the proper

21 operation of said plant as actually constructed by defendant after November, 1906, one extra sledge foreman at two dollars per day, five extra Mexicans for feeding the hoppers, at one dollar and a half per day, each, two extra car loaders at one dollar and seventy-five cents per day each, one extra oiler and machine man, at two dollars and fifty cents per day, and extra oil and waste for the operation of the plant, at a cost of one dollar per day, aggregating an actual expense per day of sixteen dollars and fifty cents. That from February 1st, 1907, to October 25, 1907, they actually worked the following number of days, to-wit: in February thirteen days, in March, twenty-five days, in April twenty-five days, in May twenty-seven days, in June twenty-five days, in July twenty-five days, in August twenty-seven days, in September twenty-five days, in October twenty days, making a total of two hundred and twelve days, at said extra sum of sixteen dollars and a half per day aggregating an extra expense of three thousand four hundred and ninety-eight dollars, for which sum they pray judgment.

Plaintiffs further show to the Court, that while said contract stipulated with plaintiffs that plaintiffs should supply defendant not less than two hundred thousand yards of rock ballast nor more than three hundred thousand yards, at the option of defendant, that defendant thereafter, on or about the 1st day of August 1906, exercised said option and agreed to take three hundred thousand yards, which agreement was made at the time and in connection with the

agreement of defendant to increase the capacity of said plant so that same would comply with the terms of the original contracts and guarantee and so that the same would produce seven hundred and fifty yards per day on an average.

Plaintiffs further show to the Court that they were on their part at all times ready and equipped and able to produce the seven hundred and fifty yards of ballast per day as in said contract stipulated for, and more, and that they have faithfully performed and carried out the provisions of said contract devolving on them to be carried out, except where prevented from so doing by the aforesaid acts of the defendant, and they say that if the defendant had complied with its contract and guarantee in regard to the capacity of the plant it had agreed to furnish, and had supplied water and coal in sufficient quantity and quality, as it had agreed to do, the plaintiffs would have been able in less than the time they were actually at work at Tecolote, and without the additional expense incurred as aforesaid, to furnish three hundred thousand yards of ballast, as the defendant had contracted with them to do. That they were prevented from so doing without any fault or negligence on their part, and over every effort they could make and did make to carry out said contract, and all by reason of the aforesaid wrongful conduct and negligence and breaches of their contract on the part of the defendant.

Plaintiffs further show to the Court that if they had been supplied with a proper plant, such as defendant's contract and guarantee required, and with proper coal and water, such as defendant contracted to furnish, that they could and would have operated the quarry and plant with the force employed by them without said extra expense for repairs, etc., and at no additional cost to them and actually at a less cost to them, and could and would have produced and delivered to defendant a thousand cubic yards of ballast per day, or at least an average of seven hundred and fifty cubic yards, or more, of ballast per day; all of which they were wrongfully prevented from doing by the acts of the defendant hereinbefore complained of. These plaintiffs further say that if furnished with a plant of the character and capacity contracted for and guaranteed by defendant, and with proper coal and water to operate same under the conditions actually existing at Tecolote, these plaintiffs could and would have produced said ballast at a net cost to them of thirty cents per cubic yard, and could and would have made a net profit thereon under the terms of said contract of fifteen cents per cubic yard for each and every yard, and could and would have made a net profit of forty-five thousand dollars, for which sum they pray judgment. That in the production of ballast there was produced one fourth of yard of screenings to each yard of ballast and in the production of the additional ballast as aforesaid plaintiffs would have produced 25,000 yds. of Screening for which they should and would have received under said contract the sum of \$5000, for which they pray judgment.

That by reason of all the aforesaid facts and the inability of plaintiff to further attempt to operate such plant without entailing ad-

ditional and prohibitive losses, plaintiffs were compelled to suspend and did finally suspend and cease operations on or about October 24, 1907.

These plaintiffs further show to the Court, that the aforesaid profit of fifteen cents per cubic yard was distinctly and expressly in the understanding and contemplation of both of the parties in entering into said contract; and that same was based on figures prepared by and submitted by the engineer and representative of the defendant, as well as on the calculation of these plaintiffs themselves.

These plaintiffs further show to the Court, that by reason of the failure of defendant to supply the character of plant contracted for and guaranteed by defendant, and by reason of the bad coal and bad water furnished by defendant to plaintiffs, and by reason of the increased cost of operating said plant and quarry from the loss of time and from the necessity of employing extra men, and from the heavy cost of repairs, and the increased cost of night work and extra blasting, and by reason of all the facts and circumstances hereinbefore detailed and complained of, the actual cost to these plaintiffs of the ballast actually delivered to the defendant amounted

24 to the sum of sixty-five cents per cubic yard for each and every yard, on an average, of the two hundred and four thousand yards actually furnished by these plaintiffs to defendant under said contract; that the said extra cost was caused wholly by the wrongful failure of the defendant to comply with its contract as herein set out, and without fault or negligence on the part of these plaintiffs: Wherefore these plaintiffs aver that they are damaged therein in the sum of forty thousand eight hundred dollars, for which sum they pray judgment.

These plaintiffs further show to the Court, that notwithstanding the incapacity of the plant to produce the amount of ballast guaranteed by defendant, the defendant penalized plaintiffs for failing to deliver the minimum amount of ballast in said contract required, that is to say, six hundred and fifty yards per day, although the failure of plaintiffs to deliver same was due wholly to the wrongful acts of defendant as aforesaid; and the defendant deducted and withheld wrongfully from the moneys coming to plaintiffs as hereinbefore stated, the sum of nine hundred and sixty-seven dollars and twenty-eight cents.

Plaintiffs further show that by the terms of said written contract the defendant agreed to and bound itself to haul all supplies and freight for plaintiffs over its own road free of charge, in consideration of other provisions of the contract, and that shortly after said contract was made a controversy arose over plaintiffs' right to ship commissary supplies free of charge, and that said controversy was settled in favor of plaintiffs by the mutual agreement of the parties, and said settlement was acceded to by defendant, and instructions issued to its agent accordingly, and was mutually acted upon for a period of about one year after the beginning of said work, but that thereafter, and about one year afterwards, without notice to the plaintiffs, and without their agreement, and without any right to do so, the defendant charged freight bills against plaintiffs therefor,

and deducted and withheld from these plaintiffs sums therefor amounting to the sums hereinafter set out; and said freight
25 agreement was made to apply to express matter shipped by these plaintiffs to Tecolote as aforesaid, which the defendant directed them to ship as baggage, but that, notwithstanding said agreement they were actually improperly charged therefor the sums hereinafter stated: For freight paid on goods returned to El Paso from Tecolote October 24, 1907, forty-seven dollars and thirty-two cents; for freight paid as per various expense bills from April 15, 1907, up to and including October 15, 1907, an aggregate of five hundred and thirteen hundred dollars and seventy-five cents; for expressage wrongfully charged plaintiffs as aforesaid, by various expense bills from March 19, 1906, to May 25 of the same year, thirty-two dollars and sixty-nine cents, and for expressage paid as per various expense bills from January 10, 1906, to October 29, 1906, aggregating eight hundred and seventy-six dollars and fifty cents, for which sums and each and all of them plaintiffs pray judgment.

That under the provisions of said contract, defendant agreed to make payments to plaintiffs after such ballast began to be delivered to it by plaintiffs under said contract, on the 20th day of each month, it being agreed that defendant might retain ten per cent of the amount due to plaintiffs until the whole of the ballast required under the terms of the contract should have been delivered. That there has been retained by defendant of said percentage the aggregate sum of ten thousand nine hundred and five dollars and sixty-two cents, which is now due plaintiffs, for which plaintiffs pray judgment, with interest to-wit, from the 23rd day of December, 1907, until paid.

That each and all of the expenditures incurred by these plaintiffs in repairing and operating said plant as hereinbefore set out were reasonable and necessary.

Wherefore premises considered, defendant being already in court, plaintiffs pray for judgment for the sum of 107,321.27 Dollars and for costs of suit and general relief.

26

RICHARD F. BURGESS,
DAVIS & GOGGIN,
PHILIP W. FREY,
Attorneys for Plaintiffs.

EXHIBIT No. 1.

El Paso & Southwestern Railroad Company.

Contract.

EXHIBIT C.

Agreement Entered Into This 13th Day of December, One Thousand Nine Hundred and Five, Between Eichel & Weikel, Hereinafter Called the Contractor, Party of the First Part, and The El Paso & Southwestern Railroad Company, Hereinafter Called the Company, Party of the Second Part.

Whereas, the Company desires to have delivered stone ballast on board its cars at Tecolote, N. M.; and;—

Whereas the bid of the Contractor for the work of delivering the said ballast has been accepted by the Company;

Now therefore, in consideration of the mutual covenants herein-after expressed, it is agreed as follows:

First. The Contractor will deliver ballast as above specified for the Company, at Tecolote, New Mexico in accordance with the drawings and specifications prepared under the direction of the Chief Engineer of said Company subscribed by the said parties hereto and bearing even date herewith, which said drawings and specifications shall be considered as and are part of this agreement, equally binding herewith, and are marked "Exhibit A."

Materials.

Second. The Contractor further agrees to furnish at own expense, under the direction and subject to the inspection and approval of said Chief Engineer of his authorized agent, all materials, tools and labor required by said drawings and specifications; to protect the said materials and labor from damage by the elements or otherwise until the completion of the work; to remove all materials, work or structures, rejected by the Chief Engineer, when directed by the said Chief Engineer or his authorized agent so to do, and to substitute instead, such materials and work as in the opinion of said Chief Engineer or his authorized agent, are required by the drawings and specifications aforesaid.

Time.

Third. The Contractor further agrees to deliver said ballast as specified in said attached specifications or that portion to the Company free and discharged of all liens, claims or charges whatsoever, on or before the — day of — Nineteen hundred and — completely finished to the satisfaction of the Chief Engineer, to be evidenced by his certificate to that effect.

Consideration.

Fourth. The Company, in consideration of the agreements aforesaid, agrees to pay or cause to be paid to said Contractor, upon presentation of certificates signed by said Chief Engineer or his authorized agent, the following rates and prices; forty-five cents per cubic yard, modified as stated in said attached specifications in lawful money of the United States, as follows; as stated in said attached specifications.

Payment.

On or about the twentieth day of each month, the value of the work, labor and material that have been placed in the before mentioned — during the previous month, all of which shall have been furnished by the Contractor under the terms of this agreement, shall be estimated by the said Chief Engineer or his authorized agent, and ninety per cent. of this value shall be then paid, and the remaining ten per cent. when the entire said contract shall have been completed in accordance with the terms of this agreement, and the drawings and specifications made a part hereof.

28 The Company will be at liberty to furnish over its own lines, free transportation for all men and tools furnished and employed on this work, to and from the Contractor's recognized place of business, on the certificate of the Chief Engineer or his authorized agent, that such transportation is for the mutual benefit of the said Company and the Contractor; and, also, transportation over said lines for materials used in construction, free or at the rates specified below, provided that no free transportation or reduced rates shall be furnished, except as expressly agreed and specified herein.

Liquidated Damages.

Fifth. Damages for delays shall be deducted from the above named contract price at the rate of — dollars for each and every day after the — day of — nineteen hundred and —, that said — remains incomplete. The sums so forfeited to be retained as liquidated and ascertained damages out of any money that may be then due or owing, or may thereafter become due or owing, to the said contractor on account of — work and material under this contract.

Alterations.

Sixth. The Company may, at any time during the progress of the work, make or require to be made any alterations or deviations in the plans, materials or workmanship, or any omission therefrom, that it may deem proper, without annulling or invalidating this contract. In case of such alterations, deviations or omissions from the plans or specifications involving any increased or diminished expense on the parts so altered, the amount to be allowed to the Contractor or to the Company shall be based upon the schedule of prices before mentioned in this agreement. If certain extra work is performed for which there is no price fixed by this agreement,

then the market value of materials and labor employed in such changes at the time such changes are made, which value shall be determined by the Chief Engineer, shall be paid for same; and in case such alterations or deviations require an additional time for execution, such additional time, as in the opinion of the Chief Engineer is fair and reasonable, shall be added to the time above stipulated for the completion of said work. Said market value and the amount of said additional time shall be determined at the time when said alterations or deviations are demanded, and this provisions is an essential part of this contract and cannot be waived by either party.

Disagreement.

Seventh. The decision of the Chief Engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; and each of the parties hereto waives any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants herein, so that the decision of said Chief Engineer shall, in the nature of an award, be final and conclusive on the rights and claims of said parties.

Failure to Complete.

Eighth. Should the Contractor become bankrupt or insolvent, or assign his property for the benefit of his creditors, or become otherwise unable to carry on the work, or in case the Contractor shall neglect or refuse to do so at any time for ten days in the manner required by the said Chief Engineer or his authorized agent, or in case of any gross carelessness or incompetency on the part of the Contractor, or in case the Contractor shall assign this contract or any part thereof without authority, in writing, of said company, or in case of repeated failure to comply with the terms of this agreement and the drawings and specifications, then the Company shall have the right, without avoiding or annulling the contract, to enter upon the work, provide such necessary materials and labor as the case may require, and remove all such defective materials or workmanship as in the judgment of said Chief Engineer or his authorized agent, may be found necessary, and carry the work to completion in such a way as shall be in accordance with the terms of this agreement, charging the cost of such labor and material to the Contractor and deducting such charges from the above named contract price; provided, the Company shall have given the Contractor ten days' notice in writing of its intention to do so.

Foreman.

Ninth. If any foreman or person in charge of any portion of the work covered by this agreement shall refuse or unreasonable neglect to comply with the requirements of said Chief Engineer, or his authorized assistant, in regard to any materials or workmanship, the said foreman or other person shall, upon complaint of the Chief

Engineer or his authorized assistant, be immediately discharged and not be given employment again upon any portion of the work.

Drawings, Etc., to Co-operate.

Tenth. The drawings and specifications are intended to co-operate, so that any work exhibited on the drawings and not mentioned in the specifications, or vice versa, is to be executed as if mentioned in the specifications and set forth in the drawings, to the true intent and meaning of said drawings and specifications, without any extra charge whatsoever.

Warranty.

Eleventh. Any repairs, renewals or replacements made necessary at any time during — months after completion of the work because of or growing out of defective materials or work done, shall be made by the Contractor upon demand by the Company, without cost to the Company; or in the event of neglect by the Contractor within five days after such demand to make such repairs, renewals or replacements, the Company may make *themselves* itself, or through others, and the cost of so making them shall be a debt immediately due by the Contractor to the Company, and may be sued for as such.

Liability for Damage.

Twelfth. The Contractor shall be responsible for all damages or injuries of every nature whatsoever done to persons or property during the performance of the work and occasioned by the said Contractor's act or neglect, or that of any sub-contractor, foreman, laborer or other employé or agent of the Contractor, and the Contractor does hereby indemnify and save harmless the Company from and against all liability by reason of any such damage or injury, and the Contractor will at his own proper cost and expense, make and maintain such temporary provision as may be necessary, by way of fences or otherwise, for the protection of persons and property during the performance of said work.

Liens.

Thirteenth. The Contractor shall save and keep the crusher plant referred to in this contract and the lands on which the same are situated, free from any and all mechanics' liens or other liens. The Company is hereby expressly authorized and directed to pay to any laborer, workman or mechanic, who shall have performed any work for the Contractor, or any material man who shall have furnished materials, and who by any law or statute is entitled to any preference in payment or lien, and who has complied with the requirements of such law or statute, if any, the amount of his claim, and deduct the amount of such payment from the contract price or amount due from the Company to the Contractor; and such Contractor shall, if required by the Company furnish any information necessary to enable the Company to determine whether

such laborer, workman or mechanic has performed such labor or services, or material man has furnished the materials for which he claims payment, and under oath if so requested. The Contractor shall also, if required by the Company, when payment is made to him, disclose the extent of his indebtedness to any laborer, workman, mechanic or material man who has not at that time requested the Company to pay him for such labor, service or materials.

Insurance.

32 Fourteenth. The Contractor shall, during the progress of the work, maintain full insurance on said work in his own name and in the name of the Company against loss by fire. The policy shall cover all work incorporated in the crusher plant and all materials for the same in and about the premises, and shall be payable to the parties hereto as their interest may appear. The effecting of such insurance shall be a condition precedent to the right of the Contractor to demand or receive payment of any installment above provided for.

Bond.

Fifteenth. Within ten days from the day of this agreement, the Contractor shall execute and deliver to the Company, a good and sufficient bond in the full amount of the contract, with Etna Indemnity Company as surety, or such other surety company as may be acceptable to the treasurer of the Company, said bond to be conditioned for the faithful performance of the contract and all the covenants and provisions thereof.

Sixteenth. The Contractor will comply with all municipal ordinances and regulations, obtain all required licenses and permits and pay all charges and expenses connected therewith.

Seventeenth. The Contractor shall not sublet or transfer this contract or any part thereof, or any interest therein, without the written consent of the Company.

Eighteenth. It is covenanted and agreed by and between the parties hereto, for themselves, their administrators, executors, successors and assigns, including sub-contractors, if any, that this contract and all of its terms and provisions shall be binding upon them, and each and every one of them.

Nineteenth. The Company shall have the right to occupy said — before its final completion at any time when the same is ready for occupancy, and said act shall not be considered as an acceptance thereof by said Company, or as waiving any of the provisions of this contract.

33-80 Twentieth. Whereas the foregoing work is done upon or for the railroad Company, which railroad is being operated by the Company; it is understood and agreed that the foregoing agreement is entered into by said Company for the benefit of said Company, *ofr* its own benefit, and that each and every covenant and agreement of the Contractor herein shall be deemed and held to run also separately to and separately inure to the benefit of said

Company, and with the same effect as such covenant or agreement runs to said company, party of the second part; and may be separately enforced against said Contractor, his heirs, executors, administrators, successors and assigns by said Company, its successors and assigns, and also by said Company, party of the second part, its successors and assigns.

In witness whereof, the parties hereto have executed this instrument in duplicate the day and year first above written.

(Signed) EICHEL & WEIKEL, *Contractor*.
 (Signed) EL PASO & SOUTHWESTERN RAIL-
 ROAD CO. COMPANY,
 By H. J. SIMMONS.

* * * * *

81 *First Amended Original Answer.*

Filed M'ch 8, 1909.

In the District Court of the Forty-first Judicial District of the State of Texas for El Paso County.

No. 6840.

EICHEL & WEIKEL, Plaintiffs,
 vs.

EL PASO & SOUTHWESTERN RAILROAD COMPANY, Defendant.

First Amended Original Answer.

Comes now the defendant in the above styled and numbered cause, and, leave of the court having been first had and obtained, files this, its first amended original answer to the petition of the plaintiffs filed herein, and by the same says:

First. This defendant excepts to said petition, and, for grounds of exception, alleges that the same does not set up facts sufficient to constitute a cause of action against this defendant, and of
 82 this it prays the judgment of the court.

HAWKINS & FRANKLIN,
 TURNEY & BURGESS,
Attorneys for Defendant.

Second. This defendant specially excepts to said petition on the grounds that the same does not state the names and official positions of the officers or agents of the defendant with whom, in said petition, the plaintiffs allege that they had negotiations, nor the names and official positions of the officers or agents who plaintiffs claim made certain alleged promises, admissions, or representations; Wherefore, defendant says that said petition is not certain and is indefinite and insufficient in law, and of this defendant prays the judgment of the court.

HAWKINS & FRANKLIN,
 TURNEY & BURGESS,
Attorneys for Defendant.

Third. For further special exception, this defendant says that the plaintiffs' original petition is insufficient in law and is too vague, indefinite, and uncertain, to enable this defendant to properly answer thereto, for the reason that it does not state in what respect or to what extent the houses and shelters provided by the defendant were inadequate or not properly constructed, nor how said defects, if any existed, contributed to plaintiffs' injury, and, as to this, defendant prays the judgment of the court.

HAWKINS & FRANKLIN,
TURNERY & BURGESS,

Attorneys for Defendant.

Fourth. For further special exception, this defendant says that the plaintiffs' original petition is insufficient in law and is too vague, indefinite and uncertain, to enable this defendant to properly answer thereto, for the reason that it does not state what agent or
83 employé of the defendant made alleged representation to the plaintiffs with reference to the climate at Tecolote, and, as to this, defendant prays the judgment of the court.

HAWKINS & FRANKLIN,
TURNERY & BURGESS,

Attorneys for Defendant.

Fifth. For further special exception, this defendant says that the plaintiffs' original petition is insufficient in law and is too vague, indefinite and uncertain, to enable this defendant to properly answer thereto, for the reason that, with reference to the 1626 hours of extra work of laborers, alleged to have been expended on the crusher plant by the plaintiffs during the year of 1906, in repairing the same, at a cost of twenty-five cents per hour, aggregating a total expense of \$406.50, and with reference to the item of 1467 hours of extra work alleged to have been expended in the season of 1907 in repairing the crusher, at a cost of twenty-five cents per hour, aggregating a total expense of \$366.70, it is not alleged in said petition the particular dates of each alleged expenditure comprising the total thereof, nor what particular part of the machinery comprising such crusher plant was repaired thereby, nor the date of said repair, nor the particular reason why such repairs became necessary, nor the names of the persons who were employed to perform such extra labor and in making such repair, nor the separate amounts paid to each person or the dates when paid for performing such extra labor, and, as to this, defendant prays the judgment of the court.

HAWKINS & FRANKLIN,
TURNERY & BURGESS,

Attorneys for Defendant.

Sixth. For further special exception, this defendant says that the plaintiffs' original petition is insufficient in law and is too vague, indefinite and uncertain, to enable this defendant to properly
84 answer thereto, for the reason that, with reference to the alleged expenditure of extra time, during the season of 1906,

of 1455½ hours of labor on the steam shovel, at fifty cents per hour, aggregating the extra expense of \$777.75, and the extra expenditure, during the season of 1907, of 941½ extra hours of work on the steam shovel, at fifty cents per hour, aggregating the total expenditure of \$470.75, it is not alleged in said petition how or in what particular manner, or for what particular reason, extra time of laborers was necessitated in the operation of such steam shovel.

**HAWKINS & FRANKLIN,
TURNEY & BURGESS,**

Attorneys for Defendant.

Seventh. For further special exception, this defendant says that the plaintiffs' original petition is insufficient in law and is too vague, indefinite and uncertain, to enable this defendant to properly answer thereto, for the reason that, with reference to the 639½ extra hours of work alleged to have been performed, during the season of 1906, it does not allege in what the repairs therein referred to consisted of, or how much of such repairs was necessitated by each particular amount of repairing so alleged to have been done, nor what particular part of such plant repairs were placed upon, nor the places and times during said season when the same was done, nor give the names of the separate employes doing the same, nor the amounts paid and the times of payment to each of the employes so engaged therein, nor is it therein separately stated how much of such expenditure of \$191.85, alleged to have been paid out on account thereof, was paid out for such repairing, and how much of the same was paid out for operation, and, as to this, defendant prays the judgment of the court.

**HAWKINS & FRANKLIN,
TURNEY & BURGESS,**

Attorneys for Defendant.

85 Eighth. For further special exception, this defendant says that the plaintiffs' original petition is insufficient in law and is too vague, indefinite and uncertain, to enable this defendant to properly answer thereto, for the reason that, with reference to the general extra work alleged to have been performed on the plant and quarry, mentioned in the petition, during the season of 1907, amounting to 389½ hours at a cost of twenty cents per hour, aggregating a cost of \$77.90, it is not stated what such extra work consisted of, nor the names of the persons performing the same, nor the separate number of hours of extra work done by each thereof, nor the amounts and dates when the same were paid to the persons so doing the same.

**HAWKINS & FRANKLIN,
TURNEY & BURGESS,**

Attorneys for Defendant.

Ninth. For further special exception, this defendant says that the plaintiffs' original petition is insufficient in law and is too vague, indefinite and uncertain, to enable this defendant to properly answer thereto, for the reason that, with reference to the items of \$250.00,

alleged to have been paid by plaintiffs to an extra boiler maker to come to Tecolote, to repair the boiler and engine therein referred to, it is not stated what the injury to such boiler and engine, which it was necessary to repair or which was repaired by said boiler maker, was, and neither is it stated what the name of such boiler maker was, nor where he came from to Tecolote, nor the amount paid to him, therefor, nor the date when he came to Tecolote to make said repairs, nor the date of payment, and, as to this, defendant prays the judgment of the court.

HAWKINS & FRANKLIN,
TURNER & BURGESS,

Attorneys for Defendant.

86 Tenth. For further special exception, this defendant says that the plaintiffs' original petition is insufficient in law and is too vague, indefinite and uncertain, to enable this defendant to properly answer thereto, for the reason that, with reference to plaintiffs' allegation of the payment to an extra fireman of \$3.50 per day for eighty-five working days, for extra labor on said steam shovel, it is not stated what particular days, or on what particular dates the employment of such extra fireman became necessary, and, as to this, defendant prays the judgment of the court.

HAWKINS & FRANKLIN,
TURNER & BURGESS,

Attorneys for Defendant.

Eleventh. For further special exception, this defendant says that the plaintiffs' original petition is insufficient in law and is too vague, indefinite and uncertain, to enable this defendant to properly answer thereto, for the reason that the plaintiffs do not state on what particular dates they were compelled to screen the coal furnished them, nor the names of the persons whom they used to so screen the same, nor the amounts paid to each therefor, and, as to this, defendant prays the judgment of the court.

HAWKINS & FRANKLIN,
TURNER & BURGESS,

Attorneys for Defendant.

Twelfth. For further special exception, this defendant says that the plaintiffs' original petition is insufficient in law and is too vague, indefinite and uncertain to enable this defendant to properly answer thereto, for the reason that the said petition does not show on what dates the water was defective, nor in what respect it was defective, nor in what way it interfered with the operation of the said plant, and as to this, defendant prays the judgment of the court.

HAWKINS & FRANKLIN,
TURNER & BURGESS,

Attorneys for Defendant.

87 Thirteenth. For further special exception, this defendant says that the plaintiffs' original petition is insufficient in law

and is too vague, indefinite, and uncertain, to enable this defendant to properly answer thereto, for the reason that it is shown by the face of the petition that it was agreed between the plaintiffs and the defendant that the plaintiffs were to be paid by the defendant from month to month, upon estimate made by the Chief Engineer or his authorized agent 90% of the value of the work, labor, and material, done performed and furnished by the plaintiffs during the preceding month, and that 10% thereof should be retained by the defendant until the whole of the ballast, which the plaintiffs had agreed to furnish the defendant, was delivered by the plaintiffs, when the said 10%, so retained, with all other payments that then might be due and payable to the plaintiffs from the defendant, under such agreement, should be paid, upon the plaintiffs obtaining a certificate from the defendant's Engineer of Maintenance of Way that the plaintiffs had acceptably discharged all of their obligations under such agreement, and which petition does not allege that the defendant's Engineer of Maintenance of Way has ever made any such certificate, and, as to this, defendant prays the judgment of the court.

HAWKINS & FRANKLIN,
TURNERY & BURGESS,

Attorneys for Defendant.

Fourteenth. For further special exception, this defendant says that the plaintiffs' original petition is insufficient in law and is too vague, indefinite and uncertain to enable this defendant to properly answer thereto, for the reason that it was provided in said contract, and as it appears upon the face of plaintiffs' petition, in substance as follows:

88 "The decision of the Company's Engineer — Maintenance of Way shall be final and conclusive in any dispute which may arise between the parties to this agreement, relative to or touching the same; and each of the parties hereto waives any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants herein so that the decision of the said Engineer — Maintenance of Way shall, in the nature of an award, be final and conclusive on the rights and claims of said parties," and said petition does not show that the said defendant's Engineer of Maintenance of Way has ever decided the alleged rights and claims of said plaintiffs, as contained and set forth in their said petition, and, as to this, it prays the judgment of the Court.

HAWKINS & FRANKLIN,
TURNERY & BURGESS,

Attorneys for Defendant.

Fourteen *a.* And further and specially excepting to that allegation in plaintiffs' petition, wherein they allege that they conferred with the defendant in regard to the furnishing of additional capacity, and the defendant did agree to furnish additional boiler and engine power, and, also, an additional crusher so as to increase the capacity of the plant to seven hundred and fifty tons per day, and for such

special exception this defendant says that the same is vague, uncertain and indefinite, and for the further reason that plaintiffs do not allege whether the same were in writing or oral, nor the terms and matters of the said agreement, and what by the terms of said agreement was made obligatory upon each party thereto, and as to this defendant prays the judgment of the court, and asks that the plaintiffs be required to plead the same with such certainness as to enable defendant to properly answer thereto.

HAWKINS & FRANKLIN,
TURNEY & BURGESS,
Attorneys for Defendant.

Fourteen *b*. And further and specially excepting to that
89 portion of said petition, wherein it is alleged that this defendant agreed with plaintiffs that the said plaintiffs should have a rate for the transportation of that portion of the plant to be shipped to Tecolote over the Chicago and Rock Island Railway Company amounting to only twenty-five per cent of the regular freight chargeable therefor, with which railroad it is in the petition alleged this defendant claimed to have a contract for the transportation of goods hauled by such Chicago and Rock Island Railway Company for its benefit, and in which it is alleged that one of defendant's agents instructed plaintiffs how to ship to Tecolote in order to get the advantage of this rate so alleged as aforesaid to be for the benefit of this defendant; because such agreement, if made, was illegal, contrary to law and void, and, also, because plaintiffs have attached to their said petition a copy of the contract and agreement between plaintiffs and defendant, and upon which such suit is brought, and it nowhere appears in such contract and agreement that this defendant agreed to furnish or secure to said plaintiffs any freight rate on the Chicago and Rock Island Railway Company's line at one-fourth of the regular rate thereon, or any other rate whatever.

HAWKINS & FRANKLIN,
TURNEY & BURGESS,
Attorneys for Defendant.

Fourteen *c*. And further and specially excepting to that portion of said petition claiming damages of this defendant because of the allegations in connection therewith that this defendant ever agreed or was ever under any contract or agreement with plaintiffs to ship commissary supplies for such plaintiffs over its road free of charge, because it says that, if it ever made any such agreement, the same was
90 contrary to law and public policy, and was void, and because it is not alleged or shown in said petition that there was ever any consideration paid to or received by this defendant for any contract so to ship free commissary supplies over its line for plaintiffs, and, also, because plaintiffs have attached to their said petition a copy of the contract wherein this defendant bound and obligated itself with reference to all free hauls over its line of railroad which was to be secured to plaintiffs, and it nowhere therein

appears that this defendant ever agreed to haul commissary supplies free for plaintiffs as in said petition alleged.

HAWKINS & FRANKLIN,
TURNERY & BURGESS,
Attorneys for Defendant.

Fourteen *d*. And for further and special exception, this defendant excepts to said petition, and, in particular, that part of the same which seeks to recover damages by reason of any alleged insufficiency of said crushing plant, for the reason that said petition and said contract between plaintiffs and defendant attached to the same and made a part thereof shows upon its face that this defendant only agreed to install a No. 7½ and a No. 5 Cylatory Austin Crusher, One ballast bin, one engine and one boiler plant, and said contract particularly describes the plant which this defendant agreed to and did deliver to said plaintiffs, and said contract on its face shows that the said plaintiffs agreed that they would provide whatever additional equipment might be found necessary to secure and maintain an average daily output of 750 cu. yds. per working day of ten hours without expense to this defendant, and said petition shows that this defendant did deliver to said plaintiffs the plant described in this contract, and, if the same was not sufficient, as alleged by the plaintiffs, to produce the amount of ballast provided by said contract, it was the duty, under said contract, of the plaintiffs to have provided such additional equipment as was necessary, and that it was not the duty of the defendant, and of this defendant prays the judgment of the court.

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HAWKINS & FRANKLIN,
TURNERY & BURGESS,
Attorneys for Defendant.

Fourteen *e*. And for further and special exception to said petition, this defendant excepts to all that portion of said petition which charges that this defendant agreed to transport any provisions, machinery or property or employes to be used by said plaintiffs in the operation of said plant free or at reduced rates, or to have any other railroad transport the same free or at reduced rates, or to furnish free transportation to plaintiffs, or any of their agents, servants or employes, or to secure reduced rates for them, and all that portion of said petition which claims damages by reason of the alleged failure of this defendant to furnish or procure said free or reduced rates, for the reason that the contract between the defendant and plaintiffs, attached to the same and made a part thereof, shows that said contract did not contain any agreement upon the part of this defendant to furnish or procure said free or reduced transportation, and in this respect said petition seeks to vary the terms of said written contract by an alleged verbal understanding, and of this defendant prays the judgment of the court.

HAWKINS & FRANKLIN,
TURNERY & BURGESS,
Attorneys for Defendant.

Fifteenth. And, for further answer in this behalf, this defendant denies each and every allegation contained in said petition, and denies that it is guilty of any of the wrongs, injuries, or trespasses therein alleged, and of this defendant puts itself upon the country.

HAWKINS & FRANKLIN,
TURNEY & BURGESS,

Attorneys for Defendant.

92 Sixteenth. And, further answering, this defendant says that heretofore, to wit, previous to the year 1906, being desirous of ballasting the railroad track, referred to in plaintiffs' petition, lying and being situate in the Territory of New Mexico, and for the purpose of supplying such ballast, it commenced the erection of a stone crushing plant on the line of said railroad, at Tecolote, New Mexico, and completed the same, to the extent hereinafter stated, such crushing plant consisting, amongst other machinery, of a No. 7½ and No. 5 gyratory Austin Crushers, together with engine and boiler machinery and power sufficient for the operation thereof, and buildings containing the same; that the same was erected and constructed along the line of such railroad and adjacent to a quarry site, from which defendant proposed to obtain the stone to be crushed as ballast in such crushing plant; that, at the time of said construction, this defendant had intended to itself operate such plant with its own employes and the same was so constructed with such intent, but that, sometime before the construction thereof was completed, the plaintiffs herein proposed to this defendant that, in event defendant would pay plaintiffs at the rate and in the manner as set out on the agreement attached to plaintiffs' petition, as an exhibit thereto, the plaintiffs would take over the operation of such plant, pay all of the expenses thereof, maintain such plant, and furnish therefrom to defendants at least seven hundred and fifty cubic yards, per ten hour day, of stone crushed for ballast as described in said agreement, and maintain and deliver such crushing plant to this defendant in good order and condition, upon the completion of the agreement of the said plaintiffs aforesaid; that, before making such proposition to this defendant, the said plaintiffs went to and upon such plant and fully examined the same and the machinery placed therein, and that, at the time of such examination, all of the machinery intended for the use hereof by this defendant had been placed in the building provided by defendant therefor, and the same was, at that time, nearly erected and completed; that the plaintiffs informed this defendant that they were experienced men in the handling of rock crushing plants, and familiar with the kind and make of machinery generally used therein and what was required for the proper construction, operation and maintenance thereof, and, at the time of the examination of the same thereby, they expressed to this defendant their satisfaction of the fact that such plant, as then practically constructed, was of a sufficient character and capacity to produce a maximum amount of one thousand cubic yards, per ten hour day, of the character of stone found in the quarry provided by defendant and which was adjacent to said plant,

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and that the furnishing of such plant by defendant would be a full compliance on the part of the defendant with the contract by which it undertook to furnish a crushing plant, mentioned in plaintiffs' said petition, and the opinion of the said plaintiffs to such effect and their willingness to accept, take over, and operate said plant upon that basis, was an inducement to this defendant to enter into the contract and agreement with such plaintiffs, which is sued upon by said plaintiffs; and that, thereafter, this defendant did make and enter into such agreement, as alleged by plaintiffs in their petition herein filed.

And defendants further say that after said contract had been executed, and while the said plaintiffs were making a trial run of the same, and within sixty days of the execution of the contract, it was mutually agreed between the parties, plaintiffs and defendant, that said contract should be so modified as to provide that the stone to be crushed by plaintiffs and delivered to the defendant, should only have to be crushed to such size as would pass through a three inch iron ring, and thereafter all such stone that was crushed was only crushed to pass through a three inch ring.

94 That before entering into such original agreement and the making to defendant of said original proposition, the plaintiffs, or one of them, went to and upon the ground where such plant was then situated and thereafter operated and along the line of said railroad, to familiarize themselves or himself with the circumstances and conditions under which crushing plant was being constructed and under which it would be necessary to operate the same, for the purpose of determining whether or not they desired to enter into such contract and agreement, and of determining the character of such plant and the character of water and coal which would be obtainable for the operation of such plant; that, during such visit of inspection of the said plaintiffs, or one of them, they were informed by the agents of this defendant that the water, which it would be necessary to use for and in such plant, was of a character which necessitated the chemical treatment thereof before being used in boilers for the development of steam and power, in order to render the same usable for such purposes; and that the plaintiffs made investigation with regard to the character of such water and coal, and from the investigations knew or by the use of reasonable diligence could have known, that the character of the coal and water which the defendant could and expected to furnish to them under said contract, and which was contemplated by said contract to be furnished, was such as actually furnished and was the only water and coal which could practically be supplied by defendant to plaintiffs, and that the character of such coal and water was a matter of general knowledge in the section in which said plant was located, and that the said plaintiffs, when they made and executed the contract aforesaid, knew and understood that the water and coal therein referred to was the identical character of water and coal furnished by the defendant to the plaintiffs under said contract.

This defendant says that, at such time and for a long time previous thereto, this defendant and its connecting carriers had,

95 at great and enormous expense, thoroughly investigated and tried by the boring of wells, the building of pipe lines, and various other ways, to develop water for use in locomotives and steam boilers and engines, which was free from such impurities as rendered the same less available or efficient for such purposes and had been unable to do so and defendant in fact says that, at such time and for a long time previous thereto, there was a section of country several hundred miles in length and a great many miles in width, along the route and on either side of such railroad, of which section of country the place of Tecolote, at which said crusher was being erected, was practically the center, where defendant had been unable to find any quantity of water, except of the very smallest amounts and soon exhausted which was fit for use for steam making purposes without treatment, and defendant then, and for a long time prior thereto, had been maintaining at points along the line of its railroad, at great expense, plants for the treatment of water, so as to render it possible to operate engines therewith, and there then was not, and for a long time previous thereto had not been, and was not, until a long time subsequent to the ceasing of plaintiffs' operations, any supply of water within a great distance of such crushing plant, suitable for use in boilers and engines, except after the same had been so chemically treated, all of which facts, with reference to such character of water, were matters of common knowledge, at El Paso and in the section of country surrounding the same including the place of Tecolote, New Mexico, and were told to said plaintiffs by this defendant's agents and ascertained by said plaintiffs, or one of them, by the personal investigation, knowledge and observation of such plaintiffs, or could have been so ascertained by use of reasonable diligence before such contract was entered into, and the same was so made by said plaintiffs with the full understanding thereof, and that the calculations of plaintiffs and the amount of compensation which they asked of this defendant 96 and which this defendant agreed to pay them for the furnishing of such ballast, as in such contract provided, was based upon such information and knowledge.

Defendant further says that the construction of such crushing plant, previous to plaintiffs and defendant entering into said agreement, as aforesaid, had been let to the Austin Manufacturing Company of Chicago, Illinois, as a whole, by defendant for a certain sum and price then specified to be paid by defendant, to wit, the sum of 12,184 00/100 Dollars, in accordance with plans and specifications fully agreed to between such Manufacturing Company and this defendant, which plans and specifications were shown to plaintiffs and explained to them, before such agreement was made and entered into, and thoroughly understood by them; that the plaintiffs, in entering into such agreement, contemplated and understood that it would be necessary for them to erect and construct all of the buildings which would be necessary for the housing, protection and feeding of employes, engaged in the operation of such plant, and that a large number of employes would be necessary therefor, and that such cost would be entirely met and paid by plaintiffs; that said

station of Tecolote is a point on such railroad remote from all places of supplies or building material, and none of the same was obtainable nearer than Alamogordo, New Mexico, a distance of about ninety miles, and that, at such time, there was great difficulty in obtaining lumber and other building material from any place whatever, except upon orders given long in advance therefor, but that such plaintiffs, notwithstanding they had knowledge of these facts, neglected, after they had made such agreement with defendant as aforesaid, to properly order or procure any lumber or other building supplies until after they had brought their employes to such station of Tecolote, the most of whom in their employ at such time were brought from Evansville, Indiana, Milltown, Indiana, and other eastern points; that the plaintiffs, or one of them, came with a car

load of such employes to said station of Tecolote, without
97 having made any preparation as aforesaid, whatever, for the housing, protection, and feeding thereof, and before the plaintiffs were in any way ready to take care of the same, and they so arrived about the time of the final construction work being done by defendant upon such plant; that the last work remaining to be done upon such plant was the separating of the various parts thereof by partitions and sheathing, and that the said Austin Manufacturing Company, was, at the time of such arrival by plaintiffs and their employes, just commencing to put in such partitions and sheathing, all the remainder of the work having been completed, and that portion of the work requiring only a short time within which to complete the same; that the said Austin Manufacturing Company had furnished and supplied upon the ground where such plant was being constructed, a large amount of such material fit for for partitions and sheathings, but, in as much as the same would be required last in the construction of such plant, had used the same in the temporary erection thereat of buildings, houses and appurtenances necessary for the use, protection and feeding of the employes being used by it in the construction of such plant, and was just commencing to utilize such materials and such buildings for the purpose of constructing such partitions and sheathings, when the plaintiffs and their employes arrived upon the ground; and the said plaintiffs, in order to properly care for and protect their employes, proposed to the agents of such Austin Manufacturing Company towit Mr. Riffing, that, in event they would not tear down the temporary buildings but would allow them, the said plaintiffs, and their employes, to occupy and use the same, it would be a great accommodation to them, the said plaintiffs, and that, in return therefor, the said plaintiffs would themselves, at their own proper cost and expense and in a proper manner, erect the partitions and sheathings, and do the other lumber work upon such plant, which the said Austin

98 Manufacturing Company had intended to do with such material, as aforesaid; that the agent of the said Austin Manufacturing Company in charge of such construction expressed his willingness so to do, in compliance with said request, provided this defendant was satisfied with the promise of the said plaintiffs to complete that portion of the work incumbent upon the Austin Manu-

facturing Company and release such Company therefrom, and that thereupon and in order to aid the said plaintiffs in the protection and care of their said employes, this defendant, through its agents, agreed to such proposal, and the said Austin Manufacturing Company then delivered such buildings in which such lumber and material was to the said plaintiffs, and the said plaintiffs thereafter used and enjoyed the same for the purposes aforesaid, but that, instead of using the material in such buildings or furnishing other material therefor, in the proper construction and erection of such partitions in such crushing plant and the sheathing thereon, the said plaintiffs, unmindful of their promise and agreements, failed so to do for a long time afterwards, and then only used small and insufficient amount of such material, or other material furnished by them in lieu thereof, for the erection of small parts of such partitions and the placing of such sheathing in said buildings from time to time and long after the use thereof was necessary in order to properly operate such plant.

Defendant further says that, in determining the character of a crushing plant which it was proceeding to erect, before the making of the agreement between plaintiffs and defendant, it corresponded with various manufacturers of and dealers in such plants throughout the country, and conferred with the same, with reference to what style and character of such plant would be necessary to have a maximum capacity of one thousand cubic yards per ten hour day, and after such investigation, adopted the plant afterwards constructed by it at Tecalote, New Mexico; that such plant was rated in the catalogue of the manufacturer from whom the same was obtained, and in the catalogues of other manufacturers and dealers, as having a maximum capacity of one thousand cubic yards per ten hour day, which maximum capacity is, however, of necessity and must always be considered in connection with and controlled by the character of stone to be crushed therein and the size to which the same is to be crushed, all of which facts were fully stated by defendant to William Eichel one of plaintiffs shortly before entering into the contract sued on and understood by plaintiffs at the time of their examination of such plant, before the entering into of such agreement as aforesaid.

Defendant further says that, at the time when plaintiffs and their employes came to Tecalote, New Mexico, while, as aforesaid, the plaintiffs had examined such crushing plant and were of opinion that the same was of the full capacity, as mentioned in the agreement between plaintiffs and defendant, yet, for the purpose of protecting the rights of such plaintiffs, with reference to the capacity which such plant when fully constructed was to have, the said plaintiffs brought in the month of Feby, or March 1906 with them upon the ground at Tecalote at such time, for the purpose of having such plant and its capacity thoroughly examined and determined, an agent, to wit one person whose name is to defendant unknown but whom it is informed is named Igert, who with plaintiffs or one of them made an inspection and test of such plant for the purpose of satisfying the plaintiffs and of advising the defendant whether

or not the same was erected and constructed according to, and had the capacity contemplated between the plaintiffs and defendant in such agreement and at such time did inspect the same that, at the time of such inspection and testing of such plant by the said plaintiffs, this defendant had not accepted the same from the Austin Manufacturing Company, but had awaited doing so until it had ascertained whether or not such plant, as so constructed, was satisfactory to the said plaintiffs under its agreement therewith; that, after such inspection and testing of said plant by the said plaintiffs

and their agent advised this defendant that such plant was
100 adequate and acceptable to plaintiffs and the agents of defendant thereupon accepted such plant as being constructed in accordance with the terms of the said agreement between such Austin Manufacturing Company and this defendant, upon the assurance of the said plaintiffs and their agent so testing the same, that the same was constructed and of a capacity satisfactory to them, under the terms of said contract and agreement, and, upon its acceptance of such plant from the said Austin Manufacturing Company, the defendant immediately delivered the same to the said plaintiffs, who, thereupon, accepted the same as being of the character and capacity stipulated in such agreement between plaintiffs and this defendant, and, afterwards, this defendant fully paid said Austin Manufacturing Company therefor the contract price thereof. That, upon the acceptance of said plant by said plaintiffs, they took over full charge, control, possession, management, maintenance and operation thereof, and then commenced their attempted operation of the same and the supplying of ballast to defendant therefrom, and from that time, to wit, in the month of February, 1906, until in December, 1907, continued in the operation, control and management of the same, and, also, at such first named time, took over and, until December, 1907, continued in the management and operation of the quarry connected therewith.

Defendant further says that at the time when the possession of such plant was so delivered to said plaintiffs, the same was a well constructed stone crushing plant of the capacity as contemplated, and, in all its various features, was in accordance with the agreement between plaintiffs and defendant, and, in event it and such quarry had been properly managed and operated, was capable of and would have fully produced all of the amount of stone per day which it was agreed by plaintiffs to produce therefrom, but this defendant says that from the time when the same was delivered to the said plaintiffs, until the time when the plaintiffs ceased to operate

101 the same, neither was the stone crushing plant nor the quarry connected therewith operated properly by the plaintiffs, but that, to the contrary, the same was managed and operated negligently, carelessly, inefficiently, without economy, and to no extent, in the way or manner in which the same should have been properly done; that the plaintiffs used therein a large number of employes of an efficient character, without the necessary skill or knowledge necessary for the proper operation thereof, and negligently failed to obtain and supply themselves with the necessary

amount of labor and employ  s for the proper operation thereof at the times when the same were necessary.

Defendant further says that it was necessary for the plaintiffs, in order to use successfully the water for steam purposes which was furnished thereto by this defendant, and of the character of which plaintiffs were fully informed, as aforesaid, before entering into such agreement, to secure engineers and firemen for the engines and boiler plants connected with such stone crusher and connected with the dinkey engines used in operating the quarry, who understood the way and manner in which to use such water for such purposes, but that, instead thereof, they supplied engineers and firemen for such purposes who were negligent or ignorant of the way and method of handling such water; that, for the purpose of assisting them in the handling of such water, such employ  s used a material known as "boiler compound," and improperly used and applied the same to such water and the said boilers, so as to greatly decrease the efficiency of such engines and boilers in the making and use of steam therefrom; that it was also necessary to have experienced employ  s for the purpose of taking care of such boilers and engines and preventing the same from wearing and destroying themselves in the ordinary operation thereof, but that plaintiffs furnished inexperienced men for such purposes, with the result that the efficiency of such plant and the machinery connected therewith was greatly damaged and lessened by the lack of care therefor;

102 that it was also necessary, in order to operate such plant, that there should be experienced and competent men employed for the purpose of running the quarry and the steam shovel used by plaintiffs in obtaining the rock from such quarry, but that large numbers of the employ  s, used by the plaintiffs therefor, were also incompetent and inexperienced, with the result that such quarry was not properly opened up, graded out, or worked and that great delay in the operation of such plant was occasioned by the constant change of plans and by the cumbersome, improper, inefficient, and awkward manner in which such quarry was opened up, graded, and worked; that it was also necessary, in order to properly operate such plant, by the use of powder to blast and break the rock in the quarry prior to its being placed in such rock crushers for the crushing thereof, and that, for such purpose, it was necessary, proper and right for the plaintiffs to have used the correct kind of powder and properly exploded the same, and to employ experienced men in drilling the holes and making the shots necessary for blasting such rock, but that to such an extent was this character of work neglected or performed by incompetent employ  s or in an improper way, and with inferior, inefficient or improper powder, that the operation of such steam shovel and of such plant was greatly impeded, delayed and interfered with, and the character and size of such rock blasted by such shots was such that the same either could not be handled by such steam shovel, or, when so handled, was too large to be crushed by such crushers when handled or fed thereto, necessitating the same being broken by and with sledge hammers, after being placed in the hoppers of such crushers,

at great expense and delay, and that so negligently was such blasting of rock and stone done and performed, that the steam shovel, pipes, and other apparatus used by the plaintiffs for such work, or for the drilling in connection therewith, and even the plant itself, which had been so constructed by defendant, was often and frequently broken, injured and partly destroyed, as a result of such blasts, greatly to the delay of such work and the expense and cost to the plaintiff of performing the same, and that the plaintiffs were, in many other ways, careless, negligent, and inefficient in the operation, management, and maintenance of such plant and quarry and the production of ballast therefrom, and that, instead of it being any fault of this defendant, as alleged by plaintiffs, that the cost of the production of such ballast to them was greatly excessive, and, instead of it being any fault of this defendant, as alleged by plaintiffs, that the plaintiffs suffered loss in operation and management of said crushing plant, or was put to increased cost therein, that the same, if true, was due entirely to the fault and negligence, acts and omissions of said plaintiffs, as above stated, and not to any fault or failure to perform its agreement by this defendant, and that but for such faults, negligence, acts and omissions of said plaintiffs, they would have been able to operate at a reasonable expense said crusher plant to its fullest capacity, and produce the maximum amount of ballast therefrom at a reasonable and proper cost to them, all of which defendant is ready to verify.

Wherefore, etc.

HAWKINS & FRANKLIN,
TURNERY & BURGESS,

Attorneys for Defendant.

Seventeen. And for further and special answer in this behalf, this defendant says that, if it ever agreed to carry commissary supplies over its line of railroad free for said plaintiffs, as alleged in plaintiffs' petition, which defendant does not admit but denies, it was never contemplated, at such time, that the said plaintiffs would use such commissary supplies other than for furnishing supplies to employes engaged in the work of producing said ballast for this defendant, and that, in event such agreement was ever made, which this defendant does not admit but denies as aforesaid, it was a part of such agreement, at such time, that such commissary supplies should be used only for such purposes, and that defendant understood that such commissary supplies were to be used only for

104 such purposes, but that shortly thereafter said plaintiffs commenced using said supplies to conduct a general mercantile business at such place of Telacote, and selling to others than those engaged in the work of producing said ballast, and that, thereupon, it became and was contrary to law for this defendant to carry to said plaintiffs such supplies free, and that upon the happening of such facts it became and was the legal duty and obligation of this defendant to charge and collect from said plaintiffs the full amount of its published freight tariff applicable to the supplies so carried

for said plaintiffs, and the same were on that account by this plaintiff so charged and collected from the said plaintiffs. All of which defendant is ready to verify, etc.

HAWKINS & FRANKLIN,
TURNERY & BURGESS,

Attorneys for Defendant.

Eighteen. And for further and special answer in this behalf, defendant says that, if it is true, as alleged by plaintiffs, that this defendant ever agreed to haul for plaintiffs, free over its line of railroad, commissary supplies, which this defendant does not admit but denies, then said agreement was, at the time of the making thereof, void, because this defendant says that it was the intention of said plaintiffs, at the time of the making of said agreement, if the same was ever made, which this defendant does not admit but denies, not to use such supplies solely for the benefit of their employes, and for the purpose of furnishing the same with supplies necessary for their maintenance during the time they were performing work for the benefit of this defendant under its contract with plaintiffs, but to use the same generally for the sale thereof to all persons, regardless of their employment with the said plaintiffs, and regardless of whether or not such persons were laborers or employes engaged in the performance of said contract between defendant and plaintiffs, and that de-

105 defendant did not understand that such supplies were to be so used by said plaintiffs and sold to the general public, but understood that they were to be used exclusively for the benefit of such employes engaged in the carrying out of said work, and that because it did so understand the same, this defendant did for a time, without however, making any contract or agreement on their part so to do, but simply in order to assist plaintiffs in the performance of plaintiffs' contract in order to benefit itself, carry commissary supplies for the said plaintiffs free of charge, but that shortly after commencing so to do it ascertained that the said plaintiffs had commenced to carry on and conduct a general mercantile business with the supplies so carried therefor free of charge by this defendant, and that, thereupon, it became and was illegal and unlawful for defendant to carry the same free, under the circumstances so stated; and illegal for the plaintiffs not to pay the regular tariff freight rates applicable to the supplies thereafter carried by defendant for plaintiffs, and that for such reason defendant thereafter required plaintiffs to pay it the same.

HAWKINS & FRANKLIN,
TURNERY & BURGESS,

Attorneys for Defendant.

Nineteen. And for further and special answer in this behalf, defendant says that it was contemplated and agreed to between the plaintiffs and the defendant in the contract set out in plaintiffs' petition that the work and labor therein agreed by the plaintiffs to be done and performed should be done and finished to the satisfaction of the Chief Engineer of this defendant; that the payments therein

agreed to be made by defendant should be made to said plaintiffs upon presentation of certificates signed by said Chief Engineer, or his authorized agent; that on or about the 20th of each month the value of the work, labor and material done and performed by the plaintiffs during the previous month should be estimated by said

Chief Engineer, or his authorized agent, and payments should
106 be made by this defendant in accordance with and under said estimates, less ten per cent thereof, retained until the completion of said contract; that if any extra work was performed by the plaintiffs for which there was no price fixed by said contract, then the value of the same should be determined by the said Chief Engineer of this defendant, and payments should be made by this defendant in accordance with said determination; that in case any alterations or deviations from the original stipulations should require additional time for the execution of such alterations or deviations, then such additional time, as in the opinion of said Chief Engineer should be fair and reasonable, should be added to the time in said contract stipulated for the completion of said work, that if any foreman or person of the plaintiffs in charge of any portion of the work covered by said agreement should refuse or unreasonably neglect to comply with the requirements of said Chief Engineer, or his authorized assistant, in regard to any materials or workmanship, the said foreman or other person should, upon the complaint of the said Chief Engineer, or his authorized assistant, be immediately discharged, and not to be given employment again upon any portion of said work that when the whole of the ballast required by this defendant under the terms of said agreement was delivered by the plaintiffs' the ten per cent retainage, with all other payments that might then be due and payable to the plaintiffs from this defendant under said agreement, should be paid to the plaintiffs upon certificates of this defendant's Engineer Maintenance of Way that plaintiffs had acceptably discharged all of their obligations under said agreement in conformity with certain specifications therein particularly set out, mentioned and described that the decision of the defendant's Engineer Maintenance of Way should be final and conclusive in all disputes which may arise between the parties to said agreement, relating to or touching the same, and each of the parties thereto waived any right of action, suit or
suits, or other remedy in law or otherwise by virtue of the

107 covenants therein contained, so that the decision of the said Engineer Maintenance of Way should, in the nature of an award, be final and conclusive on the rights and claims of said parties; that said contract and agreement was made and to be performed within and with reference to the laws of the Territory of New Mexico and such was the intention of the parties in making such contract; that there was in the Territory of New Mexico at the time when the same was so made, has been since then, and now is a certain non-statutory and unwritten law, to the effect that agreements, such as those herein specially referred to as being embodied in said contract and agreement between said plaintiffs and defendant, are valid and binding, and that neither of the parties to such contract and agreement have any right of action in a cause based thereon, and in the

covenants and agreements therein contained, but must rely for a decision of such rights and claims on the determination thereof by said Chief Engineer of Engineer Maintenance of Way, and that said contract was, under the laws of the Territory of New Mexico, valid and enforceable, and this defendant alleges that said plaintiffs should not be allowed to maintain their cause of action, because the said Engineer of Maintenance of Way has not certified that the said plaintiffs have acceptably discharged all of their obligations under said agreement, as in said contract and agreement provided, nor has said Engineer Maintenance of Way ever determined that there was anything due from this defendant to said plaintiffs on account of the matters and things by said plaintiffs complained of, except as set out and described in the plea next herein contained, and that said plaintiffs have never submitted to said Engineer Maintenance of Way for a decision thereof in accordance with said contract and agreement the matters and facts so by them complained of, except as hereinafter referred to in the plea next herein contained, and defendant alleges that all the matters complained of were and are matters in dispute between plaintiffs and defendant arising out of, relative to, and touching said contract and agreement sued on by plaintiffs within the terms, contemplation and intent thereof, and defendant

108 further says that all the matters and claims which said plaintiffs have so submitted to said Engineer of Maintenance of Way for his decision under and in accordance with such agreement as aforesaid contained in the next following plea have been passed upon and determined by said Engineer of Maintenance of Way and that this defendant has fully paid to said plaintiffs all such amounts determined by said Engineer of Maintenance of Way to be due thereto under said contract.

Twenty. And for further and special answer in this behalf, defendant says that it was contemplated and agreed to between the plaintiffs and the defendant in the contract set out in plaintiffs' petition, that the work and labor therein agreed by the plaintiffs to be done and performed should be done and finished to the satisfaction of the Chief Engineer of this defendant; that the payments therein agreed to be made by defendant should be made to said plaintiffs upon presentation of certificates signed by said Chief Engineer, or his authorized agent; that on or about the 20th of each month the value of the work, labor and material done and performed by the plaintiffs during the previous month should be estimated by said Chief Engineer, or his authorized agent, and payment should be made by this defendant in accordance with and under said estimates, less ten per cent. thereof retained until the completion of said contract; that if any extra work was performed by the plaintiffs for which there was no price fixed by said contract, then the value of the same should be determined by the said Chief Engineer of this defendant, and payments should be made by this defendant in accordance with said determination; that in case any alterations or deviations from the original stipulations should require additional time for the execution of such alterations or deviations, then such additional time, as in the opinion of said Chief En-

gineer should be fair and reasonable, should be added to the time in said contract stipulated for the completion of said work; that

109 if any foreman or person of the plaintiffs in charge of any portion of the work covered by said agreement should refuse or unreasonably neglect to comply with the requirements of said Chief Engineer, or his authorized assistant, in regard to any materials or workmanship, the said foreman or other person should, upon the complaint of the said Chief Engineer, or his authorized assistant, be immediately discharged, and not be given employment again upon any portion of said work; that when the whole of the ballast required by this defendant under the terms of said agreement be delivered by the plaintiffs, the ten per cent. retainage, with all other payments that might then be due and payable to the plaintiffs from this defendant under said agreement, should be paid to the plaintiffs upon certificates of this defendant's Engineer of Maintenance of Way, that plaintiffs had acceptably discharged all of their obligations under said agreement in conformity with certain specifications therein particularly set out, mentioned and described; that the decision of the defendant's Engineer of Maintenance of Way should be final and conclusive in all disputes which may arise between the parties to said agreement, relating to or touching the same, and each of the parties thereto herein waives any right of action, suit or suits, or other remedy in law or otherwise by virtue of the covenants therein contained, so that the decision of the said Engineer of Maintenance of Way should in the nature of an award, be final and conclusive on the rights and claims of said parties; that said contract and agreement was made to be performed within and with reference to the laws of the Territory of New Mexico; that there was in the Territory of New Mexico at the time when the same was so made, has been since then, and now is a certain non-statutory and unwritten law, to the effect that agreements, such as those herein specially referred to as being embodied in said contract and agreement between said plaintiffs and defendant, are valid and binding, and that neither of the parties to such contract and agreement have any right of action in a cause based thereon, and in the covenants and

110 agreements therein contained, but must rely for a decision of such rights and claims on the determination thereof by said Chief Engineer or Engineer of Maintenance of Way, and that said contract was, under the laws of the Territory of New Mexico, valid and enforceable, and this defendant alleges that said plaintiffs should not be allowed to maintain their cause of action, because it says that, during each and every month subsequent to any month when the plaintiffs produced and delivered to the defendant any ballast under the terms of said contract and agreement, this defendant's Engineer of Maintenance of Way, acting upon his own authority as provided in said contract and agreement, and also as the designated agent of this defendant's Chief Engineer, has estimated and determined the amount of compensation due to said plaintiffs under and in accordance with said contract and agreement for the amount of ballast so produced by said plaintiffs, and, in estimating and determining the same, has determined the amount of penalty which this defendant had a right to assess against said plaintiffs for the failure to perform

their contract and agreement as aforesaid, and also has estimated and determined the amount of damages due to the said plaintiffs on account of any delays which have been occasioned to said plaintiffs as provided in said contract and agreement by the fault of this defendant, and has, from month to month, certified thereto, and his findings of the amount thereof, and that, upon being furnished with said certificates, this defendant has in each instance, after deducting ten per cent of the amount of compensation so allowed to said plaintiffs by said Engineer of Maintenance of Way, as aforesaid, paid the remainder thereof to said plaintiffs, which amounts have been received by the said plaintiffs in full settlement of the amounts due to them at said respective periods of time, under and in accordance with the terms of said contract and agreement for the production and delivery of said ballast, and said amounts have also been received by said plaintiffs in full satisfaction and payment of any and all

111 damages or allowances on account of any delays or expenditures which have been caused to them to the date of said payments on account of any fault or obligation of this defendant in said contract contained, and while this defendant alleges that the said plaintiffs have never fulfilled their contract and agreement with this defendant, yet that in the month of December 1907, the said plaintiffs refused to longer perform the same, or furnish any ballast to this defendant thereunder, and that, thereupon, this defendant treated said contract and agreement as having been terminated, and that thereupon the last estimate of said Engineer of Maintenance of Way for the month in which the last work was performed became and was, so far as the liability of this defendant is concerned, the final certificate of such Engineer — Maintenance of Way, as contemplated in said contract and agreement; that by such final certificate so made by such Engineer — Maintenance of Way it was found and determined that there was due to the said plaintiffs the sum of four thousand seven hundred and seven $53/100$ Dollars, and so this defendant says that the said sum of four thousand seven hundred and seven $53/100$ Dollars so found to be due to the said plaintiffs in said certificate of said Engineer — Maintenance of Way aforesaid, has been fully paid thereto and received thereby and that there now remains due to said plaintiffs only the percentage which has been deducted from the various estimates and certificates of said Engineer, to the extent of ten per cent. of each sum thereunder named as being due against which amount this defendant claims a lien and set off in accordance with its plea to that effect hereinafter contained, and which amount this defendant has applied in part payment of the damages due from the said plaintiffs to this defendant on account of the failure of said plaintiffs fully to perform their contract and agreement as aforesaid, and against which amount this defendant also claims a set off and counter claim as hereinafter pleaded.

Twenty A. These defendants specially say that in giving the Engineer of Maintenance of Way and the Chief Engineer of this defendant power to pass upon the performance of the contract, the parties hereto specially had in view that the said

112 Engineer should determine whether or not the plant fur-

nished by the defendant to plaintiffs was of the capacity called for by the contract between plaintiffs and defendant, and whether or not the water furnished for use in the said plant was of the character agreed to be furnished and in fact adapted to the use to which it was to be put, and whether or not the coal furnished was of the character agreed to be furnished and in fact adapted to the use to which it was put, and the character of the stone to be crushed and whether or not one thousand yards per ten hour day could be crushed by the said plant in a ten hour day, taking into consideration the location of the quarry and the character and construction of the machinery furnished for crushing the same; and of the character of coal and water to be used; that it was the purpose and intention of both parties to the said contract that these facts and all of them should be determined by the said engineer, and the said provision of the contract giving him the power to pass on matters arising out of the contract and the performance thereof, was made and entered into for the purpose of avoiding litigation and providing a method of settling any differences that might arise between plaintiffs and defendant out of the several matters herein above especially named; and that it was the intention of the parties, in entering into the said contract, that the matters herein before specially named should be determined by the said Engineer and his decision be final, and the certificate of the said Engineer as to the adequacy of the said plant or the sufficiency and character of the coal and water furnished, and the character of the rock to be crushed and the amount that should be and could be crushed, should be and is necessary to enable the plaintiffs to recover, and that without the said certificate they would have no right of recovery under their said contract against this defendant: and as to this the defendant puts itself upon the country.

113 The defendant further says that, in accordance with the provisions of the said contract and the intention of the said parties, said Engineer of Maintenance of Way and Chief Engineer of the defendant should pass upon and determine each and all of the above questions, and his decision should be final and binding upon both parties to the said contract, the said Engineer of Maintenance of Way and Chief Engineer of defendant did, in each and all of the instances cited, pass upon and determine the said questions; that is to say, that the plant had a capacity of one thousand yards per ten hour day, taking into consideration its location, the condition in which it was turned over to the plaintiffs, and the character of the stone to be crushed, and that the water was of the character contemplated by the said contract and was, in fact, adapted to the use to which it was put under the circumstances provided for its use, and that the coal was of the character contracted to be furnished and was, in fact, adapted to the use to which it was to be put; and the plaintiffs herein recognizing this to be the true meaning and intent of themselves and the defendant, did from time to time submit to the Engineer questions arising out of the character of water to be furnished and the coal to be supplied, and of the nature and capacity of the plant for his determination, and that he,

at the instance and request of said plaintiffs and in every instance, acted upon the application and request so made to him and did in fact in each and every instance determine the said controversies, which determination on his part was accepted by the plaintiffs herein and was in all cases acted upon by them, and was accepted by the defendant and in all things acquiesced in. All of which defendant is ready to verify.

Wherefore, etc.

HAWKINS & FRANKLIN,
TURNEY & BURGESS,

Att'ys for Defendant.

114 Twenty-one. Further answering herein this defendant says that on or about the — day of —, 1907, and after the completion of all the work contemplated by the original contract between plaintiffs and defendant, a copy of which is attached to plaintiffs' original petition herein, there were disputes between the parties hereto as to the debits and credits chargeable against and to which they were entitled respectively, and also questions undetermined and in dispute as to whether or not the contract had been fully discharged and carried out on either part, and thereupon such disputes existed; and for the purpose of avoiding litigation and settling amicably and without delay and expense all such controversies existing between the parties hereto, a settlement was reached by and between them, whereby all charges of every kind and description of every nature whatever in favor of plaintiffs and against the defendant, and all charges of every kind and description of every nature whatever in favor of the defendant against the plaintiffs, were determined upon and agreed to by the parties hereto, and the said settlement showing a balance to exist in favor of the plaintiffs herein, the sum was by the defendant paid and the plaintiff accepted the same, and in accepting the same and in consideration of the matters and things in this paragraph of this answer set forth, discharged the defendant from any further liability, accepting said payment in full of all liabilities whatsoever under and by virtue of the said contract, not only all of their claims against this defendant for work done, but for omissions claimed by them under the contract, and such settlement was fairly entered into and this defendant says was binding upon both parties hereto, and that all matters, things, disputes, claims and choses in action existing between them at that time were concluded thereby; and, therefore, these plaintiffs should not now be permitted further to
115 urge their claims against the defendant by reason of and growing out of any matters existing between them at that time, and as to this it puts itself upon the country.

HAWKINS & FRANKLIN,
TURNEY & BURGESS,

Attorneys for Defendant.

Twenty-two. And for further and special answer in this behalf, this defendant says that it has paid to the said plaintiffs heretofore

and before the institution of this suit all amounts which it owed to plaintiffs under the terms and conditions of the contract mentioned in plaintiffs' petition, and in this answer, and all amounts for if it owed plaintiffs any, which this defendant does not admit but denies, by reason of any of the matters or things set up in plaintiffs' petition.

HAWKINS & FRANKLIN,
TURNER & BURGESS,

Attorneys for Defendant.

Twenty-three. And for further answer this defendant says that the plaintiffs should be and are now estopped from complaining or seeking to recover against this defendant, because of any alleged defect in the construction of or on account of the lack of capacity of the crushing plant or on account of any improper quality of water or coal which plaintiffs alleged defendant furnished thereto under contract and agreement mentioned in plaintiffs' petition, or because of any other matters or things alleged in plaintiffs' petition, for the reason that when the crushing plant, referred to in said petition, was being constructed, it was understood and agreed between plaintiffs and this defendant that as soon as such plant was ready for operation and before it was by defendant delivered to plaintiffs and thereafter operated by plaintiffs, this defendant was at all times ready and willing to have the same constructed or to have any alterations therein made, which might be required by said plaintiffs, in order that the same might be of the kind and character referred to in plaintiffs'

116 petition and the agreement annexed as a part thereof; that plaintiffs were, at such time, and for many years had been operators of stone crushing plants, and were thoroughly acquainted with the character and the different capacities of the different styles and kind of rock crushers and rock crushing plants, and defendant relied, and had a right to rely, upon their knowledge and judgment with reference thereto; that such rock crushing plant was constructed under an agreement between this defendant and the Austin Manufacturing Company, which was a company whose business it was to erect and construct such character of plants; that the agreement between plaintiffs and this defendant, attached to and made a part of such petition of plaintiffs, in so far as the same referred to the kind or character of such crushing plant therein described and the obligation therein assumed by defendant, with reference to the capacity of such plant, so agreed by it to be constructed, was based upon the advertised and published assurances and the personal assurances of such Austin Manufacturing Company and the assurances of said plaintiffs given to defendant, before the signing of such agreement, that such plant when constructed would have the capacity referred to in such agreement, and defendant says that, before giving the defendant such assurances, said plaintiffs were fully informed as to the plans, specifications and character of machinery and equipment to be used therein, and had a full opportunity to and did examine such machinery and observe such plant then being constructed, and that no reference to the capacity of such plant, as contained in such contract and agreement, was made for the purpose of binding de-

defendant absolutely to erect a plant of the capacity in such *argument* referred to, or as a guaranty that the same, when erected, would have the capacity therein referred to, but was intended only and solely as the estimate of both such plaintiffs and defendant of the capacity of the particular plant which was then being constructed by defendant and which said plaintiffs had examined as afore-

117 said, and for the purpose of establishing a maximum amount of ballast to be produced by plaintiffs in the operation thereof per day, which it would be fair and right for the plaintiffs to obligate themselves to produce; that, at such time, defendant had the right to require of the said Austin Manufacturing Company that it should construct such plant to the capacity referred to in such contract and agreement between plaintiffs and defendant, and did require the same thereof, and the said Austin Manufacturing Company tendered such plant to this defendant for its acceptance as having been erected and constructed to such capacity; that this defendant, before accepting said plant, submitted the question as to whether it was so constructed as to meet the requirements of the contract between plaintiffs and defendant, to said plaintiffs, who, at such time, were experienced as aforesaid in the construction and operation of such plants, and who, together with experts employed by them, were then and there upon the ground where such plant had been erected, and, upon the submission to them by this defendant as to whether such plant would meet the requirements of the contract and agreement between said plaintiffs and this defendant, and, after a thorough examination of such plant, which such plaintiffs then and there made, they, the said plaintiffs, came to the conclusion that the same was so constructed as to meet the requirements of said contract and agreement between said plaintiffs and this defendant, and then and there informed this defendant's agents, also, at such time, upon the ground, that the same would so meet the requirements of such contract and agreement between plaintiffs and defendant aforesaid, and then and there expressed their willingness to accept such plant as being so erected and having the capacity sufficient to meet the requirements of such contract and agreement between such plaintiffs and this defendant, in event this defendant would accept such plant from such Austin Manufacturing Company, under and in

118 accordance with the terms of the contract and agreement between said last named Company and this defendant; that, thereupon, and being induced by and relying upon the said statements and agreements of said plaintiffs to the effect above stated, and believing the same to be true, this defendant did then and there accept such plant from said Austin Manufacturing Company, and paid to the same the full amount of the agreed price for construction which was to be paid to said Austin Manufacturing Company therefor; and, in addition to the facts above stated, and particularly in support of defendant's plea of such estoppel with reference to the quality of water which was furnished to plaintiffs by defendant under the terms of said agreement between plaintiffs and defendant, defendant says that the said plaintiffs were familiar with the character of water which defendant expected to furnish to plaintiffs be-

fore the entering into said contract and agreement, with reference to such water, and that the quality and character thereof and the fitness of the same for the uses contemplated entered into the calculations of plaintiffs and the consideration which plaintiffs required this defendant to agree to pay them for the production of such ballast in such plant, and that plaintiffs were also at all times familiar therewith, from the time when such plant was turned over to them for operation, as heretofore stated, and fully consented and agreed to receive and accept from this defendant the character of water thereafter furnished to them by this defendant, and the action of this defendant in so furnishing the same, as being fully in accordance with such contract and agreement; that, during each and every month, while the said plaintiffs were in control of such plant and producing ballast therefrom, this defendant, in accordance with the terms of such contract, paid to said plaintiffs, according to the price agreed in such contract, for the ballast produced at such plant during the previous month, and that plaintiffs accepted such payments therefor and fully receipted to this defendant for the same as being the entire compensation which they were entitled to under

119 and by virtue of the terms of such contract and agreement, for the ballast furnished to defendant during such previous months, and that the total of such amounts, so paid to said plaintiffs by this defendant, upon said monthly payments, less the retainage of 10%, amounted to \$11095 62 100 Dollars; that such payments extended over and included each and every month during the time such plant was in operation, from the month of February, 1906, down to and including the month of November, 1907, and that from time to time during such operations the said plaintiffs presented their bills to this defendant for such delays in the operation of such plant as they, the said plaintiffs, at such times claimed this defendant was responsible for under the terms of said contract and agreement, and that such bills were passed upon by the Engineer of Maintenance of Way of this defendant, as contemplated in such agreement, and the same were paid and allowed by this defendant; that, during the whole of such period of time, while the said plaintiffs were so in the operation of said plant, the said plaintiffs made no claim whatever from this defendant on account of any alleged defective construction or incapacity of such plant, or on account of any damages for delay in the operation thereon, because of the quality of such water, but continued to receive and use such water without informing this defendant that they would exact or require of this defendant any damages on account of the quality thereof. That it was within the election of this defendant, under the terms of said contract and agreement between said plaintiffs and it, to determine whether it would receive 200,000 yards of such ballast or would receive 300,000 yards thereof.

And this defendant further alleges that it is not true as stated in plaintiffs' petition, that it ever considered the capacity of said plant to be less than that required by the contract, but says that same always had the capacity required by said contract. This defendant, however, states that being anxious to procure at least the ballast re-

120 referred to as rapidly as possible it voluntarily agreed to install an additional crusher known as No. eight, long after the plaintiffs had been operating said plant, and that at said time it was agreed to and understood between the parties hereto that the boiler and engine capacity of said plant, and capacity of said crusher was in accord with the requirements of said contract, but plaintiffs, after inducing defendant to install said additional crusher, agreed with the defendant that they would be able to produce 1000 cubic yards of stone per day, and at said time plaintiffs knew of the character of the water and coal which had been, and which was intended to be supplied under said contract, and the character of the plant and the stone to be crushed thereby, and that they thereupon ratified and re-affirmed said contract and elected to proceed under the same, and said crusher was constructed, turned over and accepted by said plaintiffs.

Defendant also, in further support of this plea, states and alleges that, on the 13th day of December, 1906, the said plaintiffs represented to this defendant that it was expensive to them to further continue in operation for another year, during which they contemplated the operation of such plant, the bond for \$10,000 for the proper compliance therewith, which, under the terms of such original contract, it was incumbent upon such plaintiffs to maintain in favor of such defendant, and sought relief from the further continuance thereof in order that they might avoid the payment to a surety company of the annual premium which would be due for the period of their operation in the year 1907, in event the same was continued for that year, and represented to this defendant that they would re-affirm said original contract and agreement, and continue to operate and furnish ballast to this defendant thereunder for the said year 1907, if the defendant would so change and modify the terms of said contract and agreement so that they should be no longer required to continue such bond in existence for said year; that, at the time of the making of said representation, said plaintiffs were 121 entirely familiar with the character and capacity of such crushing plant, and entirely familiar with all of the conditions surrounding the operation of the same, and the character of water and coal which it would be necessary for the defendant to furnish to them under the terms of such contract during said succeeding year of 1907 and the remainder of said year of 1906, and entirely familiar with the cost of operation of such plant and the production of ballast therefrom during said year of 1906, and what would be the reasonable cost thereof during said year 1907; that this defendant was, at such time, anxious to relieve such plaintiffs, and such plaintiffs, in order to obtain defendant's consent that such bond should no longer be continued in existence and save to themselves the cost and expense of continuing the same, to wit, the cost of \$450.00, which they would have necessarily had to expend therefor, offered, instead of the security of such bond, to give to this defendant an agreement for a lien upon all of the sums then due from this defendant to said plaintiffs and then being held as retainage under the terms of such contract, to wit, the sum of \$4,176.73, and all future amounts

which should be retained by the defendant under the terms of said contract, until the completion thereof, and then to apply such total amounts to the payment and discharge of any and all damages which this defendant might suffer through failure or refusal, on the part of such plaintiffs, to perform and carry out such contract, and also proposed and agreed that they would make no sales and delivery of any of the equipment, buildings, or other property, owned by the said plaintiffs and then situated at Tecolote and used by them in said work of crushing or carrying such rock, until they, the said plaintiffs, had fully performed said original contract, unless they should first give notice to the defendant of said intended delivery or sale of said property and receive the consent in writing of the defendant so to do; that this defendant accepted the said offer of said plaintiffs and the said original contract was modified so that the

122 said plaintiffs were relieved from the further necessity of continuing said bond as security to this defendant for the performance of the contract of said plaintiffs, and said bond and the security to this defendant was thereupon allowed to lapse by the said plaintiffs, but the said plaintiffs then and there entered into a written contract and agreement with this defendant, in accordance with the terms of their said offer so to do, in consideration of this defendant not longer requiring the continuance of said bond, wherein, among other things, the said plaintiffs reaffirmed and continued in existence the said original contract and agreement in all things, as originally contained therein, except with reference to the giving of said bond for the securing of this defendant.

Wherefore, this defendant says that, if the plaintiffs ever had any cause of action, by reason of any of the matters or things set up under their said amended complaint, which this defendant does not admit but denies, by reason of the foregoing facts, they are estopped from asserting and have waived the same, all of which defendant is ready to verify.

Wherefore, etc.

HAWKINS & FRANKLIN,
TURNER & BURGESS,

Attorneys for Defendant.

Twenty four. Now comes the defendant, and by way of counterclaim and cross action against the plaintiffs herein, says:

(a) That on divers dates during the period from November, 1906, and September, 1907, and including both said months, and at other times, it furnished to the plaintiffs certain materials, goods, wares and merchandise, and paid for them certain salaries and advanced to them certain moneys and freight charges, and refunded to them certain freight charges, such refunds of said freight charges being

123 made by error, which materials, goods, wares and merchandise the plaintiffs asked this defendant to furnish for use in the work covered by the contracts involved in this suit, and which salaries were paid and money and freight advanced and refunded at the special instance and request of plaintiffs, the dates of the same and the value thereof are more fully set forth in the item-

ized account hereto attached, marked Exhibit "A," and made a part of this answer and counter claim, and to which reference is hereby made; that the several charges contained in said Exhibit "A" for the materials, goods, wares and merchandise so furnished were the reasonable, intrinsic and market value of the articles furnished, and the said articles so furnished were accepted by the plaintiffs and used by them, and that thereby the plaintiffs became liable to the defendant and promised to pay it the several sums as therein stated to be the reasonable, fair value of the materials, goods, wares and merchandise furnished; and the said plaintiffs also agreed to and became bound and obligated to repay to this defendant the said salaries paid, moneys and freight charges advanced and freight charges refunded, and that thereby the defendant became entitled to recover the same of the plaintiffs by reason of the premises; that the character, amount, and value of the materials, goods, wares and merchandise so furnished and salaries paid, moneys and freight advanced and freight refunded is correctly set forth in said Exhibit "A" and is in the total amount of five thousand forty-one, and twenty-eight one hundredths (\$5,041.28) dollars, and of this amount the defendant prays judgment against the plaintiffs, together with interest on the same from the — day of September, 1907.

(b) And for further cross action and counter claim against plaintiffs here, this defendant says: That upon entering into the contract with the plaintiffs as hereinbefore alleged and as alleged in plaintiffs' original petition, this defendant turned over to the plaintiff a rock crushing plant, consisting, amongst other things, of rock crushers, boilers, engines, elevators, screens, inclines, etc., of the reasonable value of Fifteen thousand nine hundred & forty two 75/100 Dollars, which plant was then in good order and in all respects capable for the uses for which it was intended, and that at different periods during the continuance of the said contract defendant added other machinery to the said plant and made improvements therein, amounting to and of the reasonable value of about Eleven thousand one hundred & fifty two 08/100 dollars; that all of said machinery which was so turned over and delivered to the plaintiffs at the time of entering into said original contract, and such as was added to the plant and delivered to plaintiffs during the life of the contracts above mentioned, were used by the plaintiffs in crushing the stone as provided for in said contracts; that the plaintiffs agree- and obligated themselves and were in law and duty bound to use said quarry and plant and machinery carefully, reasonably and prudently, and to avoid all injury thereto, or deterioration thereof, except such as came from the ordinary wear and tear occasioned by the use thereof, but that the plaintiffs, disregarding the rights of the defendant and their said duty to the defendant, deposited and left upon the floor of the quarry a vast amount of rock and debris which it will be necessary to remove in order to operate the same, and excavated and left the floor of the quarry in such irregular shape as to damage the same to more than Ten Thousand Dollars (\$10,000.00), and abused and misused said machinery, negligently handled the same, negligently failed to care for and protect the same,

placed incompetent men in charge of the same, knowing that such men were incompetent, of whose incompetency plaintiffs might have ascertained by the use of ordinary care, and operated the same in so careless, improper and negligent manner as to subject it to injury, wear and tear, and deterioration not contemplated by the parties in making said contract, and not necessary or incident to the correct, right and proper use thereof, and failed to maintain the same, 125 and that by reason of the premises solely and not because of any ordinary wear and tear to which said plant and machinery would have been subjected by its proper and careful use, said plant and machinery were damaged permanently in the sum of Ten Thousand Dollars (\$10,000.00), and that by reason of the premises and the facts above set forth, the plaintiffs became liable to this defendant in the amount of the damage done to said machinery, that is to say, the sum of Ten Thousand Dollars (\$10,000.00) of which amount defendant prays judgment against the plaintiffs, together with interest on the said sum from the — day of September, 1907.

This defendant says that the plaintiffs are non-residents of the State of Texas and have no property in the jurisdiction of this court sufficient to satisfy the claims of this defendant against said plaintiffs, but that under the terms of the contract, of date the 13th day of December, 1906, the plaintiffs gave to this defendant an express lien upon all moneys due them by this defendant at the expiration of the said contract, as well as upon all properties belonging to these plaintiffs in the possession of this defendant to secure the payment to this defendant of any sum to which it may be entitled from these plaintiffs; and this lien is still in full force and effect; and that the several sums claimed by this defendant against the said plaintiffs are herein already set forth in paragraphs *a* and *b* of this counter claim and cross action; and this defendant prays that this court give judgment foreclosing the said lien as against the fund in the hands of this defendant due to said plaintiffs, and that the judgment of the court order and decree that any sum for which this defendant may obtain judgment under and by virtue of the matters and things set forth in this counterclaim and cross action be an offset against the said sum due plaintiffs by it; and as to this defendant puts itself 126-138 upon the country.

HAWKINS & FRANKLIN,
TURNER & BURGESS,

Attorneys for Defendant.

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Plaintiffs' First Supplemental Petition.

Filed Mch. 3, 1909.

In the District Court of El Paso County, Texas, in and for the 41st
Judicial District, March Term, A. D. 1909.

#6840.

EICHEL & WEIKEL, Plaintiffs,

vs.

SOUTHWESTERN RAILROAD CO. OF ARIZONA, Defendant.

Now in the above styled and numbered cause, come plaintiffs and with notice and leave of the Court, file this their first supplemental petition, and in response to the matters and things alleged in defendant's original answer filed herein and in addition to the allegations set up by plaintiffs in their first amended original petition herein filed, say:

Plaintiffs except to said original answer of defendant and say that the allegations thereof are insufficient in law, in this, to-wit:

140 First. That the allegations of said answer wherein defendant claims that plaintiffs inspected the plant to be furnished to plaintiffs by defendant and under all of the conditions then existing expressed a willingness to accept, take over and operate said plant and that they determined the character of said plant and the character of water and coal which would be obtainable for the operation of such plant, and then and there accepted same and entered into said contract for the reason that it is not alleged which if either of the plaintiffs inspected the plant or determined the character of the coal and water to be furnished nor is it alleged who or which of the plaintiffs accepted or agreed to accept same, nor is it alleged to whom such acceptance was expressed nor the time and place thereof, or whether such acceptance was oral or in writing, and for which plaintiffs pray the judgment of the court.

Second. Plaintiffs except to the allegations in said answer wherein defendant alleges that at enormous expense it thoroughly investigated and tried by the boring of wells, building of pipe lines, and various other ways, to develop water for the use of its locomotives and steam boilers and engines which was free from such impurities as rendered the same less valuable or efficient for said purpose and had been unable to do so, etc., for the reason that under defendant's contract it agreed to furnish plaintiffs coal and water necessary to run the entire quarry and crusher equipment at the rate of one thousand cubic yards of ballast per day and the fact that it, by investigation and experiment, had discovered the insufficiency of water, furnishes no excuse or defence to plaintiffs' action but on the contrary makes it apparent that defendant should have advised plaintiffs as to the condition of such water before procuring their bid for

the furnishing of such ballast, etc., and for the reason that suitable water as agreed should be furnished under the contract could have been supplied by defendant, the contract not providing that
141 such water should be furnished from any particular place, and of this plaintiffs pray the judgment of the Court.

Third. Plaintiffs except to the part of said answer where defendant alleges that it had let a contract to the Austin Manufacturing Company for the furnishing of crusher plant and that the plans and specifications therefor were shown to plaintiffs and explained to them before such agreement was made and entered into and was thoroughly understood by them, for the reason that said allegations present no defense to plaintiffs' action and prior transactions, conversations, etc., leading up to the execution of the contract could not be offered to vary the terms thereof or relieve defendant from its obligations to furnish such plant as agreed upon and guaranteed by it in said contract, and for the further reason that it does not appear that these plaintiffs were informed or advised concerning such negotiations and contract, if any, between defendant and Austin Manufacturing Company, and of this plaintiffs pray the judgment of the Court.

Fourth. Plaintiffs except to that portion of the answer (Page 13) where defendant says that plaintiffs proposed to the agent of said Austin Manufacturing Company to erect the partitions and sheathings, etc., themselves, for the reason that said answer does not disclose the name of such agent, the time and circumstances under which said alleged proposition was made to such agent by plaintiffs, and of this plaintiffs pray judgment.

Fifth. Plaintiffs except to that portion of the answer in which defendant says that before the making of the agreement between plaintiffs and defendant, it corresponded with various manufacturers of dealers in crushing plants, and after such investigation, adopted the plant afterwards constructed by it at Tecolote, New Mexico. That such plant was rated in the catalogue of the manufacturer from whom the same was obtained and in the catalogue of other manufacturers and dealers, as having a maximum capacity of one thousand cubic yards for a ten hour day, etc., which maximum capacity, must, however of necessity, always be considered in
142 connection with and controlled by the character of stone to be crushed therein, etc., all of which facts were fully stated by defendant to plaintiffs and understood by plaintiffs at the time of examination of such plant before entering into such agreement as aforesaid, for the reason that the facts therein alleged afford no defense to plaintiffs' suit and for the reason that time and place of the making of statements is not specifically stated, and for the reason that defendant, under its contract, agreed to furnish plaintiffs a plant that would crush the stone at its quarry to ballast of size mentioned in the contract with a capacity of one thousand cubic yards a day, and required plaintiffs to crush such stone with such plant to the extent of seven hundred and fifty cubic yards, or seventy-five per cent of its capacity.

Sixth. And plaintiffs further except to the allegations in de-

defendant's said answer, pleading general and common knowledge at El Paso of the character of the water along defendant's line for the reason that common knowledge at El Paso would not be the knowledge of plaintiffs and it is not made to appear that plaintiffs resided at El Paso or were affected by such common knowledge, if any, and further excepts because defendant nowhere states what person or persons, if any, informed plaintiffs of said conditions.

Seventh. Plaintiffs except to the allegations of defendant in its said answer where it shows that plaintiffs had said plant tested by its agent and that plaintiffs accepted such plant as being constructed in accordance with the terms of said agreement between Austin Manufacturing Company and this defendant upon the assurance of said plaintiffs and their expert so testing same was constructed and of a capacity satisfactory to them under the terms of said contract and agreement etc., as disclosed by Page 15 thereof, for the reason that defendant did not give the name of such expert in their answer, or of such agent of plaintiffs and did not specify which plaintiff, if
 143 one of the plaintiffs is claimed to have so acted, and for the reason that the time and place of such transactions is not stated, and for the reason that such allegations present no defense to plaintiffs' action and are in no way sufficient to relieve the defendant of the duty of furnishing the plant that it contracted to furnish under said agreement.

Eighth. Plaintiffs except to the allegations of said answer wherein defendant alleges that it was the duty of the plaintiffs to have secured engineers and firemen for the engines and boiler plants, who understood the way and manner in which to use the water, etc., for the reason that defendant was in no way bound to furnish the unsuitable water that was furnished, but on the contrary, under its contract, was bound to furnish water suitable for the purpose and it was not incumbent upon these plaintiffs to engage employes to obviate and overcome the wrong of defendant with reference to the furnishing of water as provided by this contract. That if plaintiffs used boiler compound improperly, as alleged by defendant in its said answer, such allegation affords defendant no excuse and presents no defense to plaintiffs' action since the wrong of defendant in failing to furnish suitable water, made the use of boiler compound necessary in order to overcome to a measure, the difficulties resulting from such wrong of defendant. That otherwise said allegations fail to present a defense to plaintiffs' claim and of this they pray the judgment of the Court.

Ninth. Plaintiffs except to that part of defendant's answer wherein it alleges that plaintiffs were guilty of negligently blasting the rock and stone so that the steam shovel pipes and other apparatus used by the plaintiffs for such work, or for the drilling in connection therewith, were often and frequently broken, injured and partially destroyed, for the reason that it was defendant's duty, under the contract in question, to furnish plaintiffs the plant complete at its
 144 quarry, and to place crushers, boilers, machinery etc. in such position as not to be injured by the blasting of the stone to be crushed thereby, and that if said machinery, appliances etc.

were placed so as to be injured by such blasting, the responsibility therefor was on this defendant and not the plaintiffs, and that it is not alleged that they improperly blasted or in what manner they improperly blasted so as to cause such injury, and of this plaintiffs pray the judgment of the Court.

Tenth. Plaintiffs except to that portion of said answer in which defendants allege that the contract and agreement so made and to be performed within and with reference to the laws of the Territory of New Mexico, and that there is a certain non statutory and unwritten law to the effect that such agreements are valid etc. for the reason that the question as to the validity of said agreement with reference to submitting the matters to the chief engineer and with reference to permitting him to be the sole arbiter of matters arising out of said contract, are questions of general law and not to be determined by the decisions of any territory or state, but based upon the common law as administered and interpreted by the courts. That said allegations are otherwise insufficient and furnish no defense to plaintiffs' action, and of this plaintiffs pray the judgment of the Court.

Eleventh. Plaintiffs further except to the portion of said petition in which defendant alleges that they must rely for a decision of their rights and claims on the determination thereof by said chief engineer of defendant or engineer of maintenance and way, and that they should not be allowed to maintain this action because said engineer of maintenance and way has not certified that said plaintiffs have acceptably discharged all the duties etc. for the reason that said portion of said contract as providing for the submission of all matters to said chief engineer or engineer of maintenance and way, and providing that plaintiff shall have no cause of action unless it is so submitted and certificate obtained, is contrary to public
145 policy, illegal and void. That said provisions attempt to oust the jurisdiction of the courts, and for the reason that the matters and things complained of by plaintiffs and for which they seek to recover damages herein were not the things contemplated for the ascertainment of the chief engineer as arbiter, and of this plaintiffs pray judgment of the Court.

Twelfth. Plaintiffs further except to the allegations of said answer where defendant alleges that there now remains due to said plaintiffs only the percentage which has been deducted from the various estimates and certificates of said engineer to the extent of ten per cent of which sum therein named as being due against which amount this defendant claims a lien and setoff in accordance with its plea etc., and which amount this defendant has applied in part payment of the damages due from the said plaintiffs to this defendant on account of said plaintiffs' failure to perform said contract, for the reason that defendant failed to allege or show any damages occasioned to it by plaintiffs' failure to furnish the requisite amount of ballast, whilst on the contrary, the failure to furnish said requisite amount of ballast was through defendant's default and failure to perform its part of said contract and of this plaintiffs pray the judgment of the Court.

Thirteenth. Plaintiffs except to that portion of defendant's said answer where it alleges that it was understood and agreed between plaintiffs and said defendant that as soon as such plant was ready for operation, and before it was by defendant delivered to plaintiffs and thereafter operated by plaintiffs, this defendant was at all times ready and willing to have the same constructed or to have any alterations therein made which might be required by said plaintiffs etc., for the reason that under said contract defendant bound itself to furnish to plaintiffs said plant of the capacity contracted for and it was not incumbent upon the plaintiffs to advise the defendant of the deficiencies of its plant and defendant could not await such
146 advice or instructions before furnishing the plant that it agreed to furnish under the provisions of the contract, and of this plaintiffs pray the judgment of the Court.

Fourteenth. Plaintiffs further except to that portion of said answer where defendant alleges that the capacity of the plant was based upon the advertised and published assurances and the personal assurances of such Austin Manufacturing Company and the assurances of said plaintiffs given to defendant before the signing of said agreement, for the reason that it being the duty of defendant to furnish plaintiffs with plant of the guaranteed capacity, and this without reference to the assurances of the Austin Manufacturing Company or anybody else, and defendant cannot relieve itself from the duty nor escape liability on the ground that it believed at the time such plant was purchased that it had the desired capacity, and of this plaintiffs pray the judgment of the Court.

Fifteenth. Plaintiffs further except to that part of said answer in which defendant alleges that plaintiffs had full opportunity and did examine such machinery and observe such plant then being constructed and that no reference to the capacity of such plant as contained in such contract and agreement was made for the purpose of binding defendant absolutely to erect a plant of the capacity in such agreement referred to, or as a guarantee that the same when erected, would have the capacity therein referred to, but was intended only and solely as the estimate of both such plaintiffs and defendant of the capacity of the particular plant etc., for the reason that such consideration cannot vary the contents of such contract and defendant could not be permitted to prove that its purpose was not stipulating as to the guarantee of capacity of said plant or to prove its stipulations to be not binding, that said allegations are otherwise insufficient and fail to present any defense to plaintiffs' action, and of this they pray the judgment of the Court.

147 Sixteenth. Plaintiffs except to that portion of said petition where defendant says that it had the right to require of said Austin Manufacturing Company that it should construct such plant of the capacity referred to in such contract and agreement between plaintiffs and defendant and did require the same thereof and the said Austin Manufacturing Company tendered said plant to this defendant for its acceptance as having been erected and constructed to such capacity for the reason that any arrangement or understanding between said defendant and said Austin Manufactur-

ing Company with reference to the capacity of such plant would not in any way be binding upon plaintiffs and could not affect their right to recover herein, and of this they pray the judgment of the Court.

Seventeenth. Plaintiffs further except to the allegations of said petition wherein defendant alleges that after the thorough examination of such plant, plaintiffs came to the conclusion that the same was so constructed as to meet the requirements of said contract and agreement between plaintiffs and this defendant and then and there informed this defendant's agents, also at that time upon the ground, that the same would so meet the requirements of such contract and agreement between plaintiffs and defendant aforesaid, etc., for the reason that defendant fails to state the name or names of the defendant's agents to whom such things were told and fails to state who, in behalf of plaintiffs, made such statements, and also fails to state the time and place of such transactions, for the reason that said matters there pleaded cannot be used to alter or vary the terms of the contract, and furnish no defense to plaintiffs' action herein. Wherefore plaintiffs except and ask to have stricken from said answer all matters as to the understanding of defendant and all representations made prior to entering into said contract with reference to the capacity of said plant.

Eighteenth. Plaintiffs further except to the allegations of said petition where defendant says that plaintiffs made no claim
148 whatever from this defendant on account of any alleged defective construction or incapacity of said plant, or on account of any delay in the operation thereof because of the quality of said water, but continued to receive and use such water without informing said defendant that they would exact or require of this defendant any damages on account of the quality thereof etc., for the reason that plaintiffs would not have to furnish defendant with their notice for damages or give it notice of their intention to claim damages against it, or give it notice of all the particulars in which it failed to comply with its contract, in order to be able to recover damages against it; defendant being in full possession of the facts; that said allegations otherwise fail to present any defense to plaintiffs' claim herein, and of this plaintiffs pray the judgment of the Court.

Nineteenth. Plaintiffs further except to the allegations of said defendant in its answer, same being counter-claim and cross-action against plaintiffs marked "A," wherein defendant alleges that it advanced plaintiffs certain moneys and freight charges and refunded to them certain freight charges etc. for the same is too general and does not specifically show the facts so as to put plaintiffs on notice as to the items relied upon as counter-claims against plaintiffs, nor state the dates of such payments or refunds. Wherefore plaintiffs ask a bill of particulars and pray as to the sufficiency of said answer.

Twentieth. Plaintiffs except to that portion of said answer wherein defendant alleges that plaintiffs abused and misused said machinery, negligently handled the same, negligently failed to care for and protect the same etc., etc., for the reason said allegations are

too general and fail to specify the facts so as to put plaintiffs on notice as to the proof intended to be offered by defendant. Wherefore plaintiffs ask for a bill of particulars, and pray judgment as to the sufficiency of said allegations in said answer.

149 Plaintiffs further except to said answer as a whole and say that the same is insufficient in law and presents no defense to plaintiffs' action, and of this plaintiffs pray the judgment of the Court.

PHILIP W. FREY,
DAVIS & GOGGIN,
RICHARD F. BURGESS,
Attorneys for Plaintiffs.

That in answer to the allegations pleaded by defendant in its answer, plaintiffs allege that the plant furnished by defendant under its said contract, in addition to its other insufficiencies, was not so constructed as to be operated during the cold weather. That at times on account of the cold the steam would condense in the pipes so that the steam drills furnished by defendant to plaintiffs as per said contract, could not be operated for a great portion of the time during the winter. That insufficiency necessitated the installment of additional plant and appliances for the purpose of operating the drills, and plaintiffs were thereby compelled to install a plant to operate such drills by air compression at great cost and expense, to-wit (Compressor-Receiver 2700, Pipe Line 800, Installation 250) \$3750.00 Dollars, same resulting through defendant's failure to comply with its contract to plaintiffs' damage in said sum, for which they pray judgment.

And plaintiffs further allege that they did offer to furnish the engineer of defendant with any facts or information in their possession, if any they had, necessary to enable him to discharge his duties, if any, as an arbiter and invited him to call upon them for same; that said offer was made by Wm. Eichel to J. L. Campbell on or about Dec. 29, 1907, and was made by R. F. Burges, Att'y for pl'ff, to Hawkins & Franklin, Att'ys for def't at or about the
150 same date; but that such engineer never did in fact call upon plaintiffs for any information and never did act or offer to act or undertake to act as an arbiter so far as the plaintiffs are advised, and this they are ready to verify.

And plaintiffs further say that if it was the duty of the said Campbell or defendant's engineer of maintenance of way, or chief engineer, to determine any question under said contract, or certify such determination, or give any certificate pertaining thereto which he has not determined or certified, which is not admitted but is expressly denied by the plaintiffs, that plaintiffs having gone to the said Campbell, as aforesaid, and offered to give him such information as they could to enable him to do so, his failure to act in the premises was capricious and arbitrary and fraudulent as to them.

That in answer to defendant's allegations that plaintiffs failed to complain to defendant as to the insufficiency of its plant etc., plain-

tiffs say that they did in fact complain to defendant frequently throughout their performance of said contract with reference to the insufficiency of the water and coal and the insufficiency of said plant. That they demanded of defendant that it increase said plant so as to produce the requisite amount of ballast as contemplated by said contract, and that defendant did agree to install additional plant so as to bring the same up to the contracted requirement, but that though it furnished an additional crusher, that it never supplied the necessary boiler capacity and power to operate the same in accordance with its agreement, so as to bring the whole plant up to the necessary requirements; that defendant agreed with plaintiffs that it would furnish such additional capacity by October 1st, 1906, and that if it failed to do so by that date, defendant would pay the plaintiffs sixty cents per cubic yard for all ballast furnished thereafter until said capacity of said plant had been increased as aforesaid. That defendant did not pay said plaintiffs said sixty cents per cubic yard from and after October 1st, 1906, although plaintiffs thereafter and up to the time that they were forced to cease work under said contract, furnished 144001½ yards of ballast for which they should have received the difference between forty-five cents the amount formerly contracted for with a view to the full capacity of the plant, and sixty cents, the amount offered to be paid by defendant in view of the insufficiency of the plant until the same could be brought up to the requirements of the contract, amounting to the sum of 14829.26 Dollars, for which amount plaintiffs pray judgment. (See Exhibit "A.")

That in answer to defendant's allegations, plaintiffs deny that they ever accepted the plant furnished by defendants as sufficient, either before or after the execution of said contract, that they ever told anyone or authorized anyone to say for them that said plant was sufficient and acceptable to them, or that they in any way, directly or indirectly, waived the provision of said contract calling for the furnishing of plant, appliances and facilities by defendant otherwise than it had stipulated and agreed to furnish in said contract. Plaintiffs deny that they were aware of the character of water in use by defendant or were aware of the insufficiency of the coal used by defendant and plaintiffs in no way waived their right to receive or in any way estopped themselves from obtaining good and sufficient plant, coal and water, and other facilities necessary for the production of seven hundred and fifty cubic yards of ballast per day of ten hours; but they allege that they entered into said contract, relying upon the furnishing of a plant of the capacity of a thousand yards per day and relying upon the duty of the defendant to furnish said plant complete for said purpose at said quarry, and with capacity to crush one thousand yards of ballast per day from the quality of stone thereat, and relying upon the defendant to furnish suitable water and suitable coal for the purpose of crushing said stone in said quantities, and that they only became aware of the deficiency therein when they attempted to work and use the plant, appliances, coal, water, etc., as furnished by the

defendant, and of this the plaintiffs put themselves upon the country.

For further special answer herein these plaintiffs say that it is not true, as alleged by defendant, that it was the agreement or intention of the parties that the engineer of maintenance of way, or chief engineer of the defendant, should determine whether or not the plant furnished by the defendant to plaintiff, was of the capacity called for by the contract between plaintiffs and defendant, or that said plant was of the character called for by the contract, or in fact adapted to the use to which it was put, or whether or not it was capable of crushing one thousand yards per ten hour *hour* day in view of the location of the quarry, and the character of the material to be crushed, and the machinery crushing same, but on the contrary it was understood by the parties and warranted by the defendant, that the plant should have a capacity to crush one thousand cubic yards per day at the quarry where it was and as it was erected and furnished by the defendant of the stone and material found in such quarry, and that it is not true that it was the intention or agreement of the parties that the said engineer of maintenance and way, or the chief engineer should determine whether or not the water furnished for the use of the said plant was of the character agreed to be furnished, and in fact adapted to the use for which it was to be put, nor whether or not the coal furnished was of the character agreed to be furnished, or in fact adapted to the use for which it was put, but that on the contrary the defendant agreed and bound itself in said contract to furnish sufficient coal and water of a quality suitable for the use for which it was intended, which use was known to defendant; that it was not true that the said engineer of maintenance of way, or chief engineer did pass upon said question, nor did he issue any certificate of said facts or fact, and that if he did in fact issue any such certificate it was issued without notice to these plaintiffs, and without the knowledge of the plaintiffs, and such certificate was wilfully and capriciously made with intent to defraud these plaintiffs of their rights under said contract, and were made, if made at all, in disregard of the facts and against the facts as known to said chief engineer or engineer of maintenance and way. That it is not true, as alleged by defendant, that these plaintiffs, ever acquiesced in or ever agreed to any such construction of the contract as alleged by defendant, or ever agreed to, accepted or acquiesced in any determination or decision if any, concerning the capacity of such plant, and the quality of the coal and water furnished by defendant, but that on the contrary they repeatedly and at all times insisted and demanded that defendant should furnish a plant of the capacity guaranteed by the contract, and suitable coal and water to operate the same, and that in fact the defendant at length agreed and undertook to bring such crusher plant up to the required capacity, but they only partly carried out such agreement as is more fully stated in plaintiffs' amended original petition.

Plaintiffs further show unto the Court that in order to perform the work contemplated by them under said contract, defendant

tendered to plaintiffs for their use under prior understanding and agreement had with defendant's duly authorized agent, Campbell, a certain number of steel rails, cross ties, switch stands and frogs, fish plates, bolts, nuts, etc., to be used by plaintiffs under said contract and laid in the quarry so as to connect said quarry by rail with said plant and crushers for the operation of plaintiffs' engines and cars that were required to bring said stone from the quarry to be crushed at said crushers. That plaintiffs deny that defendant has

any claim against them for or on account of said rails, etc.,
154 but say that the same were used by plaintiffs as per agreement and understanding with defendant and were left in possession of defendant upon its premises at said quarry. That plaintiffs, upon ceasing operations under said contract, offered to have said rails etc. delivered to defendant upon its cars at Tecolote for its use and disposition. That defendant upon such suggestion and proposition being made by plaintiffs to deliver said rails and ties to defendant upon its cars, sent its agent duly authorized thereunto to-wit: — Henning, who proceeded with said Eichel, one of the plaintiffs, to Tecolote to investigate the situation and determine whether or not said rails and ties should be delivered to the defendant at the quarry or on its cars, and said Henning on behalf of defendant at said Tecolote, then and there determined and advised plaintiffs that the defendant would accept the delivery of said ties and rails at Tecolote on the ground upon defendant's premises as left by plaintiffs upon ceasing said work, and did thereafter advise defendant of such determination, and defendant acquiesced therein and adopted and ratified the action of said agent.

The plaintiffs represent that the weather conditions at Tecolote, the character of the coal and water, and the insufficiency of the plant furnished to them, for the work required, were well known to the defendant company and its agent, Campbell, or should have been known to it and its said agent before, as well as at the time of the execution of the contract and has been well known to them ever since said contract, and up to the present time, and the said representations made by the said Campbell for the Company, and the Company, to the plaintiffs, were either known to be untrue by the defendant, and its said agent, or made with a reckless disregard of the truth of falsity and plaintiffs specifically deny that they abused, misused or neglected the plant or any part thereof.

And plaintiffs say that if the said Campbell has determined the claims of plaintiffs against them, as alleged by defendant,
155 that then he made such determination without any hearing, and without any notice or warning to plaintiffs, and such determination is against the facts as known by the said Campbell and capricious, and made by the said Campbell intentionally for the purpose of depriving plaintiffs of what is justly due them under their contract and is a fraud upon plaintiffs' rights.

Wherefore, defendant has no claim against plaintiffs upon its counter-claim, with respect to said rails, etc., as per bill of particulars attached to said answer and of this they *they* put themselves upon the country.

Plaintiffs further in reference to said answer, come and deny all

and singular the allegations therein contained, and of this they put themselves upon the country.

PHILIP W. FREY,
DAVIS & GOGGIN,
RICHARD F. BURGESS,
Attorneys for Plaintiffs.

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Defendant's Supplemental Answer.

Filed Mch. 8, 1909.

No. 6840.

EICHEL & WEIKEL, Plaintiffs,

vs.

EL PASO & SOUTHWESTERN RAILROAD COMPANY, Defendant.

Defendant's Supplemental Answer.

Comes now the defendant in the above styled and numbered cause, and files this its supplemental answer to the supplemental
157 petition of the plaintiffs, and by the same says:

First, This defendant excepts to said Supplemental petition for the reason that the same does not set up facts sufficient to constitute a cause of action against this defendant or defense to defendant's answer or cross complaint and of this defendant prays the judgment of the Court.

HAWKINS & FRANKLIN, AND
TURNER & BURGESS,

Attorneys for Defendant.

Second, This defendant specially excepts to the following part of said petition, to-wit:

"And plaintiffs allege that they did offer to furnish the engineer of defendant with any facts or information in their possession, if any they had, necessary to enable him to discharge his duties, if any, as an arbiter and invited him to call upon them for same, but that such engineer never did in fact call upon plaintiffs for any information and never did act or offer to act or undertake to act as an arbiter so far as the plaintiffs are advised, and this they are ready to verify," for the reason that the plaintiffs did not allege with sufficient certainty what engineer is therein referred to, nor give the name *the name* of such engineer, nor do they state the time or place where said offer therein referred to is alleged to have been made, nor when or where the invitation to said engineer was extended, and for the further reason that said part of said petition above quoted is irrelevant, immaterial, and that the facts therein alleged do not show that the plaintiffs ever complied with any of the requirements of the contract sued upon and set up in plaintiffs' original petition with reference to submission of disputes between the parties for arbitration, and because said part of said supplemental petition does

not show that the plaintiff have any right to maintain this
158 action in the absence of the determination by the arbitrator
mentioned in said contract, and of this defendant prays the
judgment of the court.

HAWKINS & FRANKLIN, AND
TURNER & BURGESS,

Attorneys for Defendant.

And further and specially excepting to that portion of plaintiffs' first amended original petition found on pages two and three thereof, which relates to and seeks to claim damages for an alleged violation of an alleged agreement of this defendant that the freight rate which should be charged plaintiffs over the Chicago and Rock Island Railway should be 25% of the regular freight rate charged thereon, for the reason that at the time it is alleged that the said promises were made by defendant to plaintiffs there was in existence certain laws of the United States, generally known as the Interstate Commerce Acts, under which it was made and was illegal for any railroad company in the United States of America engaged in commerce between the States thereof, and between the States and Territories thereof, and engaged in commerce locally in any Territory thereof, to demand, receive or charge to any person whomsoever less for the transportation of any persons or property than the regular tariff schedule rates then being charged therefor under the tariff then existing and required by such laws to be on file with the Interstate Commerce Commission at Washington, D. C., and by which laws it was also rendered illegal for any person whomsoever to pay to said carrier for said transportation of such person or property less than the regular tariff schedule rate as governed by the tariff schedules so on file with said Commission, and that, therefore, no valid contract could have been made between plaintiffs and defendant in the particular referred to in this exception, and that any such agreement, if so made, was illegal, contrary to law and void.

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TURNER & BURGESS, AND
HAWKINS & FRANKLIN,

Third. And for further answer to said supplemental petition this defendant denies each and every allegation therein contained except only those allegations thereof, if any, which are contained in this defendant's first amended original answer.

HAWKINS & FRANKLIN AND
TURNER & BURGESS,

Attorneys for Defendant.

Endorsed: In the District Court of the Forty-First Judicial district of the State of Texas for El Paso County. Eichel & Weikel vs. El Paso and Southwestern Railroad Company. Defendant's Supplemental Answer. Filed this 8 day of March A. D. 1909. I. Alderete, Clerk District Court, El Paso Co., Texas. By A. V. Gonzales, Deputy.

* * * * *

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Charge of the Court.

Filed April 19, 1909.

In District Court, El Paso County, Texas, 41st Judicial District.

No. 6840.

EICHEL & WEIKEL

vs.

EL PASO & SOUTHWESTERN RAILROAD CO.

GENTLEMEN OF THE JURY: This is a suit by plaintiffs against the defendant for the alleged breach of a certain contract alleged to have been entered into by and between the parties hereto on December 13th, 1905, whereby the defendant agreed to erect and furnish plaintiffs a crusher plant at Tecolote, New Mexico, with a maximum capacity of a thousand cubic yards of ballast in ten hours, together with suitable coal and water necessary to operate the plant and quarry. Also with certain other equipment in the contract specifically set out; and whereby plaintiffs undertook to operate the said plant and produce for the defendant two hundred thousand yards of ballast or three hundred thousand yards of same, should the said defendant elect to have the latter quantity, for forty-five cents per cubic yard, the plaintiffs agreeing to furnish all additional equipment and labor necessary for the required output, the plaintiffs to be penalized by the defendant in case the output should fall below a certain figure as stated in the contract, the defendant to furnish free transportation over its own line for all supplies and material necessary for the operation of said plant or goods, wares and merchandise to be used in connection with the operation of same. It also being agreed in said contract that ten per cent of the amount coming to plaintiffs monthly for the ballast actually produced might be retained by the defendant until the completion of the contract.

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Plaintiffs allege that the defendant failed to furnish a crusher plant of the capacity agreed to be furnished, and the plant actually furnished by the defendant was not of the capacity it was guaranteed to be, but in fact was a plant of much less capacity, and instead of furnishing coal and water of a quality reasonably sufficient and suitable for the purpose of operating said plant and quarry, furnished coal and water entirely unsuitable for that purpose. Plaintiffs further allege that by reason of the incapacity of the plant, the unsuitability and unfitness of the coal and water, plaintiffs were prevented from and unable to get the yardage required, and which they had a right to get out and would have gotten out but for the defendant's said alleged default and failure, and that the cost of the ballast actually turned out, by reason of said defaults and failures on the part of the defendant, was greatly enhanced, to plaintiffs' damage; and further that plaintiffs were finally compelled to shut down and abandon their contract by reason of said alleged defaults, and they seek to recover the retained ten per cent, the

penalties exacted for failure to produce ballast, the freight charges against them deducted for goods transported over defendant's own line, as well as said enhanced cost of production of the ballast actually produced, and also for the profits which they allege they would have made on the additional ballast which they allege that the defendant elected to take under its option, the plaintiffs alleging that the defendant in August 1906 elected to take three hundred thousand cubic yards of ballast.

The defendant answers by pleas of general denial and estoppel, and specially denying any default on its part, alleges that as
163 a matter of fact the crusher plant and such equipment as was agreed to be furnished by defendant were in fact erected and delivered to the plaintiffs at Tecolote on or about the 12th day of February 1906, in all respects in compliance with their contract. That the said crusher plant had in fact a maximum capacity of a thousand cubic yards of ballast per ten hour day with an average capacity of seven hundred and fifty cubic yards of ballast per ten hour day or more, and that as a matter of fact they did supply the plaintiffs with water and coal during the entire time of operation, except at such times as they furnished no water and coal, on which occasions it was provided the defendant should pay at the rate of \$15.00 a day for such default and which payment was made at that rate, which water and coal was reasonably sufficient and suitable for the purpose of operating said plant and quarry under said contract and in compliance with said contract. That no other or better water and coal was obtainable in that section of the country than that furnished and that said water and coal so furnished of that quality was within the contemplation of the parties at the time of the making of the contract. That the failure to produce the required amount of ballast under said contract was not due to any default on the part of the defendant, but due entirely to the failure of the plaintiffs to properly operate said plant and quarry. That the said plant and quarry were carelessly and negligently operated and not operated with proper diligence *not* to their capacity *not* in such manner as to produce the required amount of ballast, and that defendant rightfully retains the said sum of said penalties, and that it rightfully retained and retains a lien on the said retention of \$10,965.62 sued for, plaintiffs having failed to complete their contract and having breached the same; that the plaintiffs cannot recover said freight charges sued for. And defendant says that plaintiffs are due it the sum of \$943.84 for certain powder etc., for which it prays judgment over and against the
164 defendant in the sum of \$943.84. Defendant also alleges injury to its plant and quarry, for which it prays judgment.

Now as to the rules of law applicable to the case, the Court instructs you as follows:

First. You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given to the testimony, but you are not the judges of the law. The law of the case you will take from this charge and the special charges, if any, given you herewith, and it is your duty to be governed thereby.

Second. The burden of the proof in the case rests upon the plaintiffs and before they can recover they must establish all the facts necessary to their recovery by preponderance of the evidence.

Third. Now you are instructed that under the written contract sued on and in evidence before you, the defendant railway company agreed to erect at its quarry at Tecolote, New Mexico, a complete crusher plant, consisting of boilers, engine and crushers, elevators, screens, ballast bins, etc., with a maximum capacity at said quarry of a thousand cubic yards of ballast in ten hours and with an average capacity of seven hundred and fifty cubic yards in ten hours, broken in the crusher to the maximum sizes that will pass through a three inch ring, together with two No. 3½ steam drills, one steam boiler, with steam pipe and steam hose, for drilling the quarry, and one small Duplex pump with pipe connections for water supply, and also agreed to furnish the plaintiffs the water and coal necessary and of a suitable quality to procure an output under said contract of seven hundred and fifty cubic yards of ballast per ten hours. That the plaintiffs undertook to take over said plant and operate it, and provide all of the additional equipment,

labor and service necessary to enable said plant to produce, 165 from said crusher plant from said quarry so furnished by the defendant, the said amount of ballast to be furnished under said contract and broken in the crusher to the sizes aforesaid, and that by and under said contract the said defendant railway company guaranteed to the plaintiffs that the crusher plant to be furnished by them with the power necessary to operate it, should and would be a crusher plant with a maximum capacity, with stone properly fed from said quarry, of a thousand cubic yards of ballast per day of ten hours.

Now you are instructed that if said crusher plant installed by the defendant company did not have a maximum capacity of a thousand cubic yards of ballast per day of ten hours, or if the water or coal were of quality not reasonably suitable for the operation of said plant, and if by reason of either of said causes, if any, the production of ballast by the plaintiffs was reduced beneath seven hundred and fifty cubic yards per day of ten hours, and beneath that which you believe from the evidence plaintiffs would otherwise have actually produced, with reasonable care, management, and diligence, with the force and equipment furnished by them and used in the operation of said plant, and plaintiffs suffered loss and damage by reason thereof, then and in that event, the defendant would be liable for such loss and damage, if any, as was the proximate result of the failure, if any, of the defendant to furnish a crusher plant as guaranteed of a thousand yards maximum capacity per ten hour day, or failure, if any, to furnish reasonably suitable coal or reasonably suitable water as agreed under said contract.

Fourth. Now if you believe from a preponderance of the evidence that the said crusher plant so agreed to be installed by the defendant, as actually installed by the defendant at Tecolote, New Mexico, did not in fact have a maximum capacity for the production of a

thousand cubic yards of ballast in ten hours from the store
166 at the Tecolote quarry when properly fed and the plant
properly operated, and that by reason thereof the amount
of ballast produced by the plaintiffs during the time they were
operating said plant in the years 1906 and 1907, exclusive, however,
of the time lapsing and ballast produced from October 1st, 1906
to November 7th, 1906, inclusive of both dates, was reduced below
the average of seven hundred and fifty cubic yards of ballast per
ten hour day, and that plaintiffs did operate said plant with reason-
able care, management and diligence and that had said plant
actually had a maximum capacity of a thousand yards of ballast
per ten hour day and been capable of producing an average of
seven hundred and fifty yards per ten hour day, that then the
amount of ballast turned out by the plaintiffs would have exceeded
the amount actually turned out by them, or believe that the coal
or water, or both, furnished by the defendant to the plaintiffs for
the operation of said plant was not reasonably suitable for the pur-
pose intended by the parties, and actually reduced the capacity of
the plant and the actual output of ballast, and that had the coal
and water so furnished been reasonably suitable and adapted for the
purposes for which they were intended by the parties, the actual
output of ballast would have been increased, and you believe from
the evidence that said ballast actually produced by the plaintiffs
during the time named would have been produced in a shorter time
and at a less actual cost to the plaintiffs, then and in that event you
will find in favor of the plaintiffs for the difference, if any, between
the reasonable actual cost to plaintiffs of all ballast actually produced,
except that produced from said October 1st to November 7th,
inclusive, 1906, and what you believe from the evidence it would
have reasonably cost them to produce the same had the said plant
had a maximum capacity at said quarry of a thousand cubic yards
of ballast per ten hours, if it had not, and had the coal and
167 water so furnished by defendant been of a quality reasonably
sufficient and suitable for the production of steam for the
operation of said plant, if it was not.

You are instructed in this connection that there can be no recovery
by plaintiff for any additional cost, if any, of the production of
ballast between October 1st, 1906 and November 7th, 1906, arising
out of any default, if any, on the part of the defendant, for under
the undisputed evidence, the defendant and plaintiffs have adjusted
and settled any damage, if any, accruing to the plaintiffs by reason
of additional cost, if any, of the production of ballast, during said
period. The amount of ballast produced during said period, the
evidence shows was, twelve thousand, eight hundred and ninety-
seven cubic yards.

Fifth. The plaintiff alleges that the defendant on or about the
1st day of August, 1906, exercised its option under said contract
and agreed to take three hundred thousand yards of ballast instead
of two hundred thousand yards. Now if you believe from the
evidence that in fact, as alleged by plaintiffs the defendant did
exercise its option and agreed and promised plaintiffs to take three

hundred thousand yards of ballast, or any other amount of ballast in addition to the two hundred and four thousand one hundred and ten yards actually delivered, and you further believe from the evidence that said crusher plant had not a maximum capacity of a thousand cubic yards of ballast per ten hour day but its capacity was less than that guaranteed by the defendant, or believe from the evidence that the defendant failed to furnish the plaintiffs with water or coal reasonably suitable for the purposes for which they were furnished, or both, and that by reason of said failures, if any, to furnish a plant of the capacity agreed, or the failure to furnish reasonably suitable water and coal, if any, or by reason of all of said things combined, if any, the said plant was incapable of producing the amount of ballast required, and you further believe from the evidence that but for such failure on the part of said defendant, if any, and had such plant had a maximum capacity, with the coal and water reasonably suitable for the operation thereof, of a thousand yards of ballast for ten hours, or been capable of producing on an average of seven hundred and fifty cubic yards of ballast per ten hours, that then the plaintiffs could and would have been enabled to carry out their said contract and produce an additional amount of ballast and would have produced the additional amount of ballast over and above the two hundred and four thousand one hundred and ten yards actually produced and that they could and would have produced said additional ballast, or any part thereof, at a profit to themselves, but were prevented from doing so by said alleged default or defaults on the part of defendant, if any, then and in that event, you will find in favor of the plaintiffs for such profit, if any, as you believe from the evidence they would have made on such additional yardage.

You are further instructed in connection with the foregoing paragraphs of this charge that where a contract is breached by one of the parties thereto, to the damage of the other, it becomes the duty of such injured party to exercise ordinary care, prudence and discretion to so conduct himself and the business pertaining to the contract as to minimize the damage which may accrue to him by reason of such breach.

Now if you believe from the evidence that the said crushing plant installed and furnished by the defendant to plaintiff was not of a thousand yards maximum capacity per ten hours, as guaranteed by the defendant, if it was not, and that it reasonably became apparent to plaintiffs that it was not of the capacity guaranteed, if it was not, and that the defendant would not bring it up to the capacity, if it was not, as required by the contract and make it a plant of a thousand yards maximum capacity, and that said alleged breach, if any, would continue, then it became the duty of the plaintiff to exercise ordinary care, prudence and discretion to minimize the damage which might reasonably accrue to them, if any, as approximate result of such breach.

Now, therefore, if you believe from the evidence that the said contract was breached in the particular stated at any time after the beginning of the operation of such plant by the plaintiffs, and the

fact if it was a fact, that such breach would be a continuing one, became apparent or should reasonably have become apparent to the plaintiffs, and that in the exercise of ordinary care, prudence and discretion, for the purpose of minimizing such damage as might reasonably result from such breach, if any, the plaintiffs should have closed down such plant and refused to continue to operate same under the contract, and you believe from the evidence that the plaintiffs by closing down the plant would in fact have reduced the damage, if any so accruing, then and in that event the plaintiffs cannot recover in this case the enhanced damage, if any accruing to them by reason of their failure to so shut down and cease to further operate said plant under said contract, but could only recover such damages, if any, as would proximately have accrued to them in addition to the damage already accrued if any, had they closed down such plant at such time, and refused to further operate same, and such damage, if any, would be the loss of the profits, if any, which you believe from the evidence the plaintiffs would have made, not exceeding, however, fifteen cents per cubic yard, on the ballast, if any, which you believe from the evidence the plaintiffs would have turned out and delivered under said contract, if the same had not been breached by the defendant, over and above the amount of ballast which had then already been produced and delivered thereunder, if any.

Now, therefore, if you believe from the evidence that the
170 defendant did breach the contract sued on, by failing to supply a plant of a thousand yards maximum capacity, and that the defendant failed and refused to bring such plant up to the required capacity under such contract, and that such facts became apparent or should reasonably have become apparent to plaintiffs at any time during the operation of the plant at Tecolote, and that in the exercise of reasonable prudence, care and discretion, the plaintiffs should have closed down said plant and refused further to operate same, then and in that event the measure of damages would be the enhanced cost, if any, (due to the incapacity, if any, of the plant, or the unsuitability, if any, of the water and coal), of the ballast supplied, if any, before such plant should have been closed down by the plaintiff, and in addition thereto the reasonable profits, if any, not exceeding fifteen cents per cubic yard, which the plaintiffs would have made, if any, on the ballast, if any, which you believe from the evidence, plaintiffs would have supplied and delivered under the contract, over and above the amount which had been already delivered at the time you believe such plant should have been closed down.

In case you do not believe that such plant should have been closed down by the plaintiffs at any time in the exercise of reasonable care, prudence and discretion, but if you find for the plaintiffs under any of the foregoing paragraphs of this charge, then and in that case the measure of damages would be that already given you in the said preceding paragraphs.

Sixth. You are instructed that the undisputed evidence produced shows that the defendant has retained in its possession from

the amounts to become due plaintiffs for ballast actually produced the sum of \$10,905.62. Now if you believe from the evidence that the defendant did not furnish a plant as agreed by it to be
171 furnished but furnished a plant of less capacity than that agreed, or furnished coal and water of a quality not reasonably suited for the purpose for which it was intended and that thereby the plaintiffs were prevented from carrying out their said contract, then and in that event you will find in favor of the plaintiffs for said sum of \$10,905.62.

Seventh. You are instructed that the defendant undertook to and did penalize plaintiffs for failure to turn out the yardage as required under said contract and retained as penalties out of the moneys due plaintiffs, if said penalties were improperly imposed, the sum of \$1503.34. Now, if you believe from a preponderance of the evidence that said plant did not have a maximum capacity of a thousand yards of ballast per day of ten hours nor an average capacity of seven hundred and fifty cubic yards per ten hours, or believe from the evidence that the said water or coal furnished was not of a quality reasonably suitable for the purposes for which it was intended, if it was not, and further believe from the evidence that the penalties exacted and deducted, or any part of same, would not have accrued had said plant been of the capacity guaranteed by the defendant, if it was not, or had the coal or water been of a quality reasonably suitable for the purposes intended, if they were not, and that said reduction below the output of six hundred and fifty cubic yards for which the plaintiffs were penalized, was attributable to and caused by the said want of capacity, if any, in the plant, or unsuitable coal or water, if any, then and in that event you should find for the plaintiffs for such part of said penalties of \$1503.34 as were due to such failure, if any, on the part of defendant and not to the fault of the plaintiffs.

Eighth. You are instructed that the plaintiffs claim that the defendant has deducted from the moneys coming to them for ballast furnished, certain sums for freight charges made against the plaintiffs for goods carried for plaintiffs over defendant's own line
172 to its plant at Tecolote, New Mexico, to be used in connection with the operation of said plant, and allege that it was agreed and understood between the defendant and the plaintiffs that all goods, wares or merchandise to be used by plaintiffs at its commissary for and in connection with the operation of the said plant at Tecolote, should be transported free of charge by the defendant company, over its own line.

Now, if you believe from the evidence that it was agreed and understood between the parties that such goods, wares and merchandise should be transported free of charge over the defendant's lines of railway, then and in that event you will find for the plaintiff for such sum or sums as may have been deducted and withheld by the defendant out of the moneys coming to the plaintiffs for such freight charges over its own line, which said freight charges amount to \$513.

But you are instructed in this connection that under the law

the plaintiffs are not entitled to recover anything for any deductions that may have been made for freight charges over lines other than those of the defendant, as under the law the *the* defendant would not be permitted to give or secure for the plaintiff a reduction of freight rates over lines other than its own, and you are further instructed in this connection that you can and will allow the plaintiffs no recovery against the defendant for express charges paid by the plaintiffs for the transportation of articles to Tecolote, as under the contract of the parties the defendant would be in no case liable for express charges.

Ninth. You are instructed as to defendant's counter claim that it is admitted by the parties that there is due to the defendant for powder and other items a balance of \$943.84, and you will find this sum in favor of defendant against plaintiffs with six per cent interest on said amount from the 1st day of January, 1908, to the

173 present time. It is also agreed between the parties and admitted in open court that the defendant is not entitled to recover on any of the other articles set forth in its counter claim and asked for against the plaintiffs, except for the amount claimed as damages to the quarry and crusher plant.

Now, you are instructed as to the damages to the crusher plant that under the contract the plaintiffs are not liable to the defendant for any reduction in value accruing to said plant by reason of ordinary wear and tear, and are only liable for injuries that may have accrued to said plant, not due to such causes, but due to the negligent handling, operation or want of reasonable care, if any, of same on the part of the plaintiffs.

Now, therefore, if you believe from the evidence that any part of said plant or equipment furnished by defendant, was broken or injured by reason of the negligence of the plaintiffs in failing to properly care for or operate the same and left in such condition, then and in that event you will find for the defendant on its counter claim over against the plaintiffs, the difference between the value of said plant in the condition it would have been in by reason of having suffered only ordinary wear and tear and the condition it was left in by reason of negligent operation, handling or want of care, if any, on the part of the plaintiffs.

Tenth. Now you are instructed that the defendant alleges that the said crusher plant agreed to be furnished by it and actually constructed and delivered by it to the plaintiffs did in fact have a maximum capacity of a thousand cubic yards of ballast in ten hours and was in reasonable compliance with the contract and that coal and water furnished for the operation of said plant and quarry were reasonably suitable and sufficient for the operation of same and in reasonable compliance with the contract as to quality.

Now if you believe from the evidence that said plant so furnished by the defendant and erected at Tecolote, when properly operated and the crushers properly fed, did have a maximum capacity

174 of a thousand cubic yards of ballast of the size contracted for in ten hours from the stone taken from said quarry, and that the coal and water furnished by the defendant under said con-

tract for the operation of said plant and quarry were of reasonably suitable quality for the operation of the same, then and in that event you will find for the defendant.

The defendant also alleges that the plaintiffs failed to operate said plant in a reasonably proper and diligent manner to obtain the output contemplated under the contract.

Now if you believe from the evidence that the said plant furnished by the defendant under said contract did have a maximum capacity of a thousand cubic yards of ballast in ten hours, or, that it did not have a maximum capacity of a thousand cubic yards in ten hours, but believe from the evidence that the reduction in output claimed by plaintiffs was caused by the failure, if any, on the part of plaintiffs to properly operate the said plant or due to any failure or default, if any, on the part of plaintiffs in the operation, care or management of said plant or quarry, and not due to the failure of the defendant, if any, to furnish a plant with a maximum capacity of a thousand cubic yards of ballast per ten hours, and was not due to the failure, if any, of the defendants to furnish water or coal reasonably suitable for the purpose intended, then and in that event you will find for the defendant as to plaintiffs' said alleged claim for damages by reason of the alleged additional or enhanced cost of production of the ballast actually produced and as to their claim for profits which they allege they would have made on yardage over and above the yardage actually turned out, and as to their claim for penalties withheld as stated herein.

Eleventh. If you find for the plaintiffs under the evidence and instructions given you, you will deduct from the amount you so find for them, if any, such sums as you may find for defendant on its cross action, under the evidence and instructions, and you will find in plaintiffs' favor for the balance only, if any, which you so find.

If you find for the defendant against plaintiffs' claims for damages and find against the plaintiffs in favor of the defendant in any sum on *his* cross action, other than that set out in paragraph No. 9 of this charge, then and in that event you will state what sum you find, if any, in favor of the defendant against plaintiffs.

Twelfth. If you find for the plaintiffs in said sum you will also add in their favor interest on the same at the rate of six per cent per annum from January 1st, 1908 up to the present time.

Should you find for the defendant on *his* cross action in any sum and against the plaintiffs additional to that directed in paragraph nine of this charge, you will find for it interest on said sum at the rate of six per cent per annum from January 1st, 1908 up to the present time.

A. M. WALTHALL,

Judge Not Judicial District of Texas.

Endorsed: 6840. Eichel & Weikel vs. E. P. & S. W. R. R. Co. Charge of the Court. Filed this 19 day of April, A. D. 1909. L. Alderete, Clerk District Court, El Paso Co., Texas. By A. V. Gonzales, Deputy.

Plaintiffs' Special Charge.

Filed April 19, 1909.

In District Court of El Paso County, Texas, 41st Judicial Dist.

No. 6840.

EICHEL & WEIKEL

VS.

EL PASO & SOUTHWESTERN RY. CO.

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Requested by Counsel for Pffs.

GENTLEMEN OF THE JURY: You are instructed that in the event you should believe from the evidence that the crusher plant supplied by the defendant to the plaintiffs, under the contract sued upon, did not have a maximum capacity of one thousand cubic yards of ballast in ten hours, and you should further believe from the evidence, if you do so believe, that the plaintiffs would have been unable, either from the manner in which they opened and developed the quarry, or the size or manner to which they broke the stone, or transported the same to the crushers, or the manner in which they conducted the drilling or blasting in the quarry necessary to produce such stone, were unable to produce such stone in the quantity or at such price as they should and could have done otherwise, or that all or any of such causes combined to reduce the output of ballast below what it would otherwise have been or to enhance the cost of production beyond what it would have been, but for the above mentioned defaults of plaintiffs, if any, then and in that event the defendant would not be liable to plaintiffs for any reduction in the output of ballast, if any, or for any enhancement of the cost of producing same, if any, which was due to any or all of the above mentioned defaults of plaintiffs if any, and not due to the incapacity of the plant, if any, nor to the unsuitable quality of the coal or water, if any, and you will not allow the plaintiffs anything in that case.

Given.

A. M. WALTHALL, *Judge.*

Endorsed: 6840. Eichel & Weikel vs. E. P. & S. W. R. R. Co.
 Filed this 19 day of April A. D. 1909. I. Alderete, Clerk District
 Court, El Paso Co., Texas. By A. V. Gonzales, Deputy.

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Special Charge of Plaintiffs.

Filed April 19, 1909.

In District Court of El Paso County, Texas, 41st Judicial Dist.

No. 6840.

EICHEL & WEIKEL

vs.

EL PASO & SOUTHWESTERN RY. Co.

Requested by Counsel for Pl'ffs.

GENTLEMEN OF THE JURY: You are instructed that in the event you believe from the evidence that the crusher plant supplied by the defendant to the plaintiffs did not have a maximum capacity to crush a thousand cubic yards of ballast in ten hours, but did have an average daily capacity to crush all the stone suitable for crushing therein which the plaintiffs were able to supply thereto, in the manner in which the plaintiffs laid out and worked the quarry in connection therewith, and transported the stone therefrom to such plant, then you will not allow any damages to plaintiffs as against the defendant, on account of the crushing plant not having a maximum capacity to crush one thousand cubic yards of ballast in ten hours, if it did not, but if you further believe from the evidence that either the water or coal furnished for the operation of said plant, or both, were not reasonably suited for the purpose intended and that the inability, if any, of the plaintiffs to supply the crushers with stone properly quarried, was due to the unsuitability, if any, of the coal or water furnished, and resulted in an actual reduction of the output of ballast from the quarry, then and in that event you may take into consideration the capacity of the crusher plant in determining the amount of ballast, which you believe from the evidence the plaintiffs could and would have turned out, but for the unsuitability, if any, of said coal and water.

Requested by the plaintiffs.

Given.

A. M. WALTHALL, Judge.

178

Endorsed, 6840. Eichel & Weikel vs. E. P. & S. W. R. Co. Filed this 19 day of April A. D. 1909. I, Alderete, Clerk District Court, El Paso Co, Texas. By A. V. Gonzales, Deputy.

Plaintiffs' Special Charge.

Filed Apr. 19, 1909.

In the District Court of El Paso County, Texas, 41st Judicial District.

No. 6840.

EICHEL & WEIKEL

VS.

EL PASO & SOUTHWESTERN RY. CO.

Requested by Counsel for Pl'ffs.

GENTLEMEN OF THE JURY: You are instructed that if you believe from the evidence that the crusher plant as delivered to the plaintiffs did in fact have a thousand yards maximum capacity in ten hours as actually erected and delivered by defendant, but that its capacity was reduced by changes made in the setting of the concaves after such plant was delivered to plaintiffs or by reason of other changes, if any, in the plant, made by plaintiffs, then and in that event the defendant would not be liable for any reduction, if any, in the output of ballast, by reason of such changes, if any, or by reason of any reduction in the capacity of such crushing plant, if any, or in any way by reason of such changes, if any.

Given.

A. M. WALTHALL, Judge.

Endorsed: 6840. Eichel & Weikel vs. E. P. & S. W. R. R. Co.
Filed this 19 day of April, 1909. L. Alderete Clerk District Court,
El Paso Co., Texas. By A. V. Gonzales, Deputy.

Defendant's Special Charge No. 6.

Filed Apr. 19, 1909.

179

No. 6.

No. 6840.

EICHEL & WEIKEL

VS.

EL PASO & SOUTHWESTERN RAILROAD COMPANY.

GENTLEMEN OF THE JURY: At the request of the defendant you are instructed that the defendant, by entering into the contract between it and the plaintiffs sued on in this case, did not warrant or agree that the crushing plant to be constructed by it should have a maximum capacity to produce 1,000 cubic yards per ten hours of ballast crushed to any particular size, and that, in event you believe

from the evidence, if you do so believe, that the crushing plant supplied by defendant to plaintiffs had a maximum capacity to crush 1,000 cubic yards of stone per ten hours to any size which would fairly come under the description of the word "ballast" as the same is generally understood, and that by operating the same in a proper manner the plaintiffs could have produced a daily average of 750 cubic yards of ballast per ten hours, crushed so as to pass through a three inch ring, then plaintiffs are not entitled to recover from defendant any damages caused by such plant not having a maximum capacity to crush 1,000 cubic yards of stone per ten hours to pass through a two inch ring, if you believe from the evidence that it did not have such capacity.

HAWKINS & FRANKLIN,
TURNERY & BURGESS,

Attorneys for Defendant.

Given.

A. M. WALTHALL, *Judge.*

Endorsed: 6840. Eichel & Weikel vs. E. P. & S. W. R. R. Co.
Filed this 19 day of April 1909. I. Alderete Clerk District Court,
El Paso Co., Texas, by A. W. Gonzales, Deputy.

180

Defendant's Special Charge No. 26.

Filed Apr. 19, 1909.

No. 26.

No. 6840.

EICHEL & WEIKEL

vs.

EL PASO & SOUTHWESTERN RAILROAD COMPANY.

GENTLEMEN OF THE JURY: At the request of the defendant you are instructed that if you believe from the evidence that the water supplied by the defendant to plaintiffs for the purpose of operating such crushing plant and for the use of plaintiffs in the operation of the quarry at Tecolote, was not of the character or quality which the court has heretofore charged the jury it was the duty of the defendant to furnish under the contract sued on in this case, but could have been reduced to such quality or character by plaintiffs at the time of using the same, by the proper use of a compound adapted to such purposes, and that the plaintiffs agreed to accept from the defendant and use such compound if furnished by defendant for such purposes, and that, thereafter, the defendant did furnish such compound to said plaintiffs for such use, then it was the obligation and duty of the plaintiffs that such compound should be used by them for such purposes, and, in event you believe from the evidence that the plaintiffs did not so use the same or used the same in an improper manner, and that because of the

failure of the plaintiffs to use the same or to use the same in a proper manner, the quality or character of the water which was actually furnished by defendant to plaintiffs for the operation of such plant remained in the condition that it was when defendant furnished the same to plaintiffs or was not reduced to the character or quality which it was originally the duty of the defendant to furnish to plaintiffs for said use, and that because thereof plaintiffs were put to any additional expense or were unable to produce the ballast which they
 181 could otherwise have produced, except for the bad quality of such water, then and in that event you will not allow plaintiffs any damages because of the quality or character of such water not being such as the defendant was obligated to furnish and supply to plaintiffs, in so far as such damage, if any, of plaintiffs to use, or properly use such boiler compound.

HAWKINS & FRANKLIN,
 TURNEY & BURGESS,

Attorneys for Defendant.

Given.

A. M. WALTHALL, *Judge.*

Endorsed: 6840. Eichel & Weikel vs. E. P. & S. W. R. R. Co.
 Filed this 19 day of April, A. D. 1909. I. Alderete, Clerk District Court, El Paso Co., Texas. By A. V. Gonzales, Deputy.

Defendant's Special Charge No. 30.

Filed Apr. 19, 1909.

No. 30.

No. 6840.

EICHEL & WEIKEL

VS.

EL PASO & SOUTHWESTERN RAILROAD COMPANY.

GENTLEMEN OF THE JURY: At the request of the defendant you are instructed that the size and method of shooting and preparing the stone to be crushed in the plant at Tecolote supplied by defendant to plaintiffs for such use was under the control and management of the plaintiffs, and, if you believe from the evidence that there was any delay or insufficiency in the operation of the plant by virtue of the stone transported to the crusher being in sizes too large for the feeding of the same to the
 182 crusher, and that because of the same being too large a size the plaintiffs were put to any additional expense or damage, then that the plaintiffs cannot recover of the defendant such additional expense or damage which ensued to the plaintiffs on account thereof, nor for any additional profits which they would have

made by reason of an increased output of ballast per day from such plant had said stone been of proper size.

HAWKINS & FRANKLIN AND
TURNER & BURGESS.

Attorneys for Defendant.

Given.

A. M. WALTHALL, *Judge.*

Endorsed: 6840. Eichel & Weikel vs. E. P. & S. W. R. R. Co.
Filed this 19 day of April, A. D. 1909. I. Alderete, Clerk District
Court, El Paso Co., Texas. By A. V. Gonzales, Deputy.

Defendant's Special Charge No. 38.

Filed Apr. 19, 1909.

No. 38.

No. 6840.

EICHEL & WEIKEL

vs.

EL PASO & SOUTHWESTERN RAILROAD COMPANY.

No. 38.

GENTLEMEN OF THE JURY: At the request of the defendant you are instructed that, even though you may believe that there was found in the quarry operated by the plaintiffs boulders or rock that was more difficult to crush than that which was seen by the plaintiffs and their agent Igert, or which might have been by the plaintiffs or their agent Igert by a reasonable examination of said quarry before the execution of the contract sued on by plaintiffs, and, even though you may believe that the presence of said boulders, if any, or such rock, if any, diminished the output of the crushers, yet you cannot find any damage in favor of the plaintiffs and against the defendant caused by the presence of such boulders or hard rock.

HAWKINS & FRANKLIN,
TURNER & BURGESS.

Attorneys for Defendant.

Given.

A. M. WALTHALL, *Judge.*

Endorsed: 6840. Eichel & Weikel vs. E. P. & S. W. R. R. Co.
Filed this 19 day of April, A. D. 1909. I. Alderete, Clerk District
Court, El Paso Co., Texas. By A. V. Gonzales, Deputy.

Defendant's Special Charge No. 40.

Filed Apr. 19, 1909.

No. 40.

No. 6840.

EICHEL & WEIKEL

VS.

EL PASO AND SOUTHWESTERN RAILROAD COMPANY.

GENTLEMEN OF THE JURY: At the request of the defendant you are instructed that in working the quarry which was delivered by defendant to plaintiffs for the production of ballast therefrom, it was the legal obligation and duty of the plaintiffs in the extraction of the stone therefrom to work the same in such reasonably proper manner necessary or common to quarry plants as would leave the same in a reasonably proper condition for the future operation thereof, provided there was any stone fit for quarrying left therein after the operations of plaintiffs had ceased, beyond the time

when the plaintiffs should have finished work therein. 184-207 and that you are, therefore, instructed, if you find from the evidence that the plaintiffs did not so work and operate such quarry as to leave the same in such reasonably proper condition, and that upon the cessation of the operations thereof by said plaintiffs there was left therein stone fit for quarrying, and in event you should further find that because of the improper manner in which such quarry was operated by the plaintiffs the operation of such quarry in the future would be additionally expensive to the defendant over and beyond the cost of the operation thereof provided the same had been left in such reasonably proper condition for the operation, then and in that event you will find for the defendant upon its cross action such damages on account of the improper working of such quarry, if any, by plaintiffs, if you find that the same was so improperly worked, as will equal the cost and expense of putting such quarry in proper condition for the future operation thereof, allowing in reduction of such damages such amount, if any, as would equal the value of the stone which would be produced in the course of putting such quarry in such proper condition for the future working thereof.

HAWKINS & FRANKLIN,
TURNER & BURGESS.

Attorneys for Defendant.

Given.

A. M. WALTHALL, Judge.

Endorsed: 6840. Eichel & Weikel vs. E. P. & S. W. R. R. Co.
Filed this 19 day of April, A. D. 1909. I Alderete, Clerk District
Court, El Paso Co., Texas. By A. V. Gonzales, Deputy.

* * * * *

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Defendant's Special Charge No. 21.

Filed Apr. 19, 1909.

No. 21.

In the 41st Judicial District Court in and for El Paso County, Texas.

EICHEL & WEIKEL

vs.

EL PASO & SOUTHWESTERN RAILROAD COMPANY.

Defendant's Special Charge No. 21.

GENTLEMEN OF THE JURY: At the request of the defendant you are instructed that, if you believe from the evidence that the plaintiffs accepted the monthly estimates of work performed by them under the contract and fixing the amount of their compensation for work done, upon the basis of the amount of the daily output, and receipted for the same, and continued so to — during the entire period of operation under the contract, without protest with reference to the amount or rate of such compensation and without notifying the defendant that they ever expected to claim any additional compensation for the work done by plaintiffs and ballast furnished to defendant, or without making to defendant or its agents any claim for damages by reason of any alleged failure of defendant to perform its contract, then and in that event you are charged that they can not now assert a right to recover any additional compensation for the ballast so produced by them or damages for any additional cost to them of producing said ballast, payment for which was so made to and received by them at said contract price, or payment for any services rendered or ballast furnished at any other than the contract rate so received by them upon the basis of their monthly estimates, and your verdict as to all such claims for additional compensation or for damages sustained during the period covered by the monthly estimates upon which they have been paid, should be in favor of the defendant.

HAWKINS & FRANKLIN AND
TURNER & BURGESS.*Attorneys for Defendant.*

Refused.

A. M. WALTHALL, *Judge.*

Endorsed: 6840. Eichel & Weikel vs. E. P. & S. W. R. R. Co.
Filed this 19 day of April, A. D. 1909. T. Alderete, Clerk District
Court, El Paso Co., Texas. By A. V. Gonzales, Deputy.

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243

Defendant's Special Charge No. 43.

Filed Apr. 19, 1909.

No. 43.

244

No. 6840.

EICHEL & WEIKEL

vs.

EL PASO & SOUTHWESTERN RAILROAD COMPANY.

Defendant's Special Charge No. 43.

GENTLEMEN OF THE JURY: At the request of the defendant you are instructed that the contract herein sued on provided that the decision of the Company's Engineer of Maintenance of Way shall be final and conclusive in any dispute which may arise between the parties to such agreement relative to or touching the same, and that each of the parties to such agreement waives any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants of said agreement, and agrees that the decision of the Engineer of Maintenance of Way shall, in the nature of an award, be final and conclusive on the rights and claims of said parties. You are instructed that the said contract was intended by the parties to be performed in the Territory of New Mexico, and that, in so far as it has been performed has been performed within the Territory of New Mexico, and that under the laws of the Territory of New Mexico the agreement above referred to is a valid and binding agreement upon both parties to this suit. Now, if you believe from the evidence herein that the Engineer of Maintenance of Way of the defendant Company has heretofore decided and determined that the plant was of the capacity warranted, and that the coal and the water were serviceable for the purposes for which they were intended, and that all allowances which plaintiffs would be entitled to by reason of delays on account of the lack of coal and water or the bad character of coal and water, if any such bad coal and water existed, and any such allowance therefor has been in fact allowed and made by the said Engineer of Maintenance of Way and the plaintiffs been paid therefor by the defendant, if any payments were due to the

245-246 said plaintiffs hereunder by reason of such allowances and such determination upon the part of the Engineer of Maintenance of Way, then and in that event the plaintiffs would not be entitled to recover anything herein by reason of the incapacity of the plant or the character and quality of coal and water furnished on account of the decision of the Engineer of Maintenance of Way on the terms and provisions of the contract above recited; unless you further believe that, in making such decisions and awards, the Engineer of Maintenance of Way acted in fraud of the plaintiffs' rights herein, or in such ignorance thereof as to

amount in law to a fraud, should you not so believe said Engineer of Maintenance of Way acted in fraud or in such gross mistake as to impute bad faith to him, then and in that event your verdict must be for the defendant as to all claims arising out of matters so adusted by said Engineer of Maintenance of Way.

HAWKINS & FRANKLIN,
TURNER & BURGESS,

Attorneys for Defendant.

Refused.

A. M. WALTHALL, *Judge.*

Endorsed: 6840. Eichel & Weikel vs. E. P. & S. W. R. R. Co.
Filed this 19 day of April A. D. 1909. I, Alderete Clerk District
Court, El Paso Co., Texas. By A. V. Gonzales, Deputy.

* * * * *

217 *Defendant's Special Charge No. 45.*

Filed Apr. 19, 1909.

No. 45.

No. 6840.

EICHEL & WEIKEL

vs.

EL PASO & SOUTHWESTERN RAILROAD COMPANY.

Defendant's Special Charge No. 45.

248-254 GENTLEMEN OF THE JURY: You are hereby instructed that the contract sued on in this case provides that the decision of the Company's Engineer of Maintenance of Way shall be final and conclusive in any dispute which may arise between the parties to this said agreement, relative to or touching the same, and each of the parties to such agreement by the terms thereof waive any rights of action, suit or suits, or other remedy at law or otherwise, by virtue of the covenants contained in the said agreement, and expressly agrees that the decision of the Engineer of Maintenance of Way shall, in the nature of an award, be final and conclusive on the rights of the said parties. You are further instructed that the said agreement was to be performed within the Territory of New Mexico, and that so much of the agreement as has been performed within the said Territory of New Mexico, and that the said agreement was valid and binding upon the parties thereto under the laws of the Territory of New Mexico. You are further instructed that under the laws of the Territory of New Mexico, and the provisions of the said contract made in pursuance thereof, the matters and things in dispute in this controversy between the plaintiffs and the defendant, should have been submitted to the decision

of the Company's Engineer of Maintenance of Way, and not having been so submitted and acted upon by him, no judgment herein can be rendered against the defendant arising out of matters involved in said dispute.

HAWKINS & FRANKLIN,
TURNER & BURGESS.

Attorneys for Defendant.

Refused.

A. M. WALTHALL, *Judge.*

Endorsed: 6840. Eichel & Weikel vs. E. P. & S. W. R. R. Co.
Filed this 19 day of April A. D. 1909. I. Alderete Clerk District
Court, El Paso Co., Texas. By A. V. Gonzales, Deputy.

* * * * *

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Judgment.

B'k 6, P. 248.

In District Court, El Paso County, Texas, 41st Judicial District.

No. 6840.

EICHEL & WEIKEL, Plaintiffs,

vs.

EL PASO & SOUTHWESTERN RAILROAD CO., Defendant.

Be it remembered that on the 8th day of March, 1909, came on regularly to be heard the above styled and numbered cause and came both the parties, plaintiff and defendant, by their respective attorneys and announced ready for trial, and thereupon came a jury of twelve good and lawful men, to-wit: J. E. McDuffie and eleven others, who, after having been duly empaneled and sworn to try the case, and having heard the pleadings read, the evidence introduced from day to day, and argument of counsel, and having been duly instructed by the Court as to the law of the case, on the 20th day of April, 1909, returned into Court the following verdict; and upon their oaths do say:

"We the jury in the above styled and numbered cause find for the plaintiffs in the sum of Thirty-two Thousand Six Hundred Eighty and 64/100 (\$32680.64) Dollars, less the sum of Nine Hundred Forty-Three and 84/100 (\$943.84) Dollars, due the defendant by plaintiffs as admitted, making a net amount as found in favor of plaintiffs, of Thirty-one Thousand Seven Hundred Thirty-six and 80/100 (\$31736.80) Dollars with interest on the said last named amount at the rate of six per cent (6%) per annum, from January 1st, 1908, to this date.

D. E. McDUFFIE,

Foreman.

Which verdict was received by the Court and ordered filed.

It is therefore, considered, ordered and adjudged by the Court that the plaintiffs, William Eichel and Adam Weikel, composing the firm of Eichel & Weikel, do have and recover of and 256-377 from the defendant, El Paso & Southwestern Railroad Company, the sum of Thirty-one Thousand Seven Hundred Thirty-Six and 80/100 (\$31736.80) Dollars, with interest thereon at the rate of six (6%) per cent per annum from January 1st, 1908, to the date of this judgment, amounting in the aggregate to Thirty-four Thousand One Hundred Ninety-six and 45/100 (\$34196.45) Dollars, and it is further considered and adjudged by the Court, that on said aggregate sum, plaintiff recover interest at the rate of six (6%) per cent per annum from this the 20th day of April, 1909, and that plaintiffs have their execution.

* * * * *

378 *Assignments of Error.*

(Filed July 28, 1909.)

In the District Court of the Forty-first Judicial District of the State of Texas for El Paso County.

379 No. 6840. —

EICHEL & WEIKEL, Plaintiffs,

VS.

EL PASO & SOUTHWESTERN RAILROAD COMPANY, Defendant.

Assignments of Error.

Comes now the defendant in the above styled and numbered cause and makes, files and assigns the following errors in the above styled and numbered cause for review and correction by the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas, sitting at San Antonio:

First. The trial court erred in its general charge to the jury in charging the jury, in effect, that the defendant guaranteed that the rock crushing plant furnished to the plaintiffs by the defendant had a maximum capacity of 1,000 cubic yards per ten hour day, the undisputed evidence showing that the defendant did not guarantee that said rock crushing plant had that or any other capacity whatsoever.

Second. The trial court erred in the third paragraph of its general charge to the jury in instructing the jury that, under the written contract sued on and in evidence before them, the defendant agreed to erect at its quarry at Tecolote, New Mexico, a complete crushing plant, consisting of boilers, engines, crushers, elevators, screens, ballast bins, etc., with a maximum capacity at said quarry of 1,000 cubic yards in ten hours, and with an average capacity of 750 cubic yards in ten hours, broken in the crushers to the maximum sizes that will pass through a three inch ring, together

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used for housing the plaintiffs' employes during the performance of the work under the contract, alleged by the said Eichel to have been \$2500 for the reason that the same was immaterial and irrelevant to any issue in the case, and for the further reason that the evidence showed that this sum was simply the first cost of said houses and tents, and no showing was made as to the disposition thereof by the plaintiffs when they ceased operation under the contract, all of which appears in defendant's bill of exceptions No. 11 filed herein."

As it appears on page 188 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Seven.

The Court erred in failing and refusing to sustain Appellant's First Proposition under Appellant's Forty-eighth Assignment of Error, which is as follows:—

"The contract sued on providing that the appellant should pay appellees a fixed sum per cubic yard for the ballast produced and that the appellees should pay all the costs of producing the same, the amount expended by appellees for tents and houses used in the production of said ballast was immaterial and irrelevant and harmful to appellant."

1500 As it appears on page 188 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Eight.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Forty-eighth Assignment of Error which is as follows:—

"There was no testimony introduced showing, or tending to show, whatever finally became of the houses and tents purchased and used in the production of the ballast under the contract sued on, nor as to whether the same were consumed in said use or as to how much the same depreciated, or as to the value of the same after the completion of said work."

As it appears on page 189 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Nine.

The Court erred in failing and refusing to sustain Appellant's Forty-ninth Assignment of Error, which is as follows:—

"The trial court erred in permitting the plaintiff to prove by Wm. Eichel, one of the plaintiffs herein, the cost of the production of the said ballast, for the reason that the same was immaterial and irrelevant to any issue in the case, and for the further reason that the evidence of the said Wm. Eichel showed that he had no personal knowledge of the cost of production of the said ballast under the conditions existing at Tecolote, taking into consideration the character of the stone, the character of the coal and water, the climatic condi-

tions under which it was produced, the character and quality of labor available and the distances from the markets of all kinds, and for the further reason that the said Wm. Eichel showed that he had no familiarity whatever with the cost of production of such ballast under ideal conditions, or any other conditions, other than those at Tecolote, either as to climatic conditions, the character of the stone the character and quantity of labor available and the distance from the markets."

1501 As it appears on page 190 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Ten.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Forty-ninth Assignment of Error, which is as follows:

"The contract sued on in this case providing that the appellees should pay all the costs of producing the ballast under the contract and that the appellant should pay them a fixed sum of forty-five cents per cubic yard for all ballast so produced, the evidence of the cost of the production of said ballast was immaterial and irrelevant, and the court erred in permitting the witness Eichel to testify as to the cost of said ballast."

As it appears on page 191 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Eleven.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Forty-ninth Assignment of Error, which is as follows:—

"The evidence of the witness Eichel showed that he had no personal knowledge of the cost of the production of ballast under the conditions existing at Tecolote, taking into consideration the character of stone to be crushed, the coal and water, the climatic condition, or any other facts or elements entering into a determination of the cost of such production, and his statement appears upon the face of the record to be a mere guess or surmise on his part and was therefore inadmissible, and the court erred in admitting the same."

As it appears on page 192 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Twelve.

The Court erred in failing and refusing to sustain Appellant's Fiftieth Assignment of Error, which is as follows:—

1502 "The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs herein, over the objections of the defendant, that he estimated the amount that he had paid out in the way of interest on the plant and interest on the amount required to carry on the contract to be \$5,000, for the rea-

son that the same was immaterial and irrelevant to any issue in the case, and for the further reason that the plaintiffs had already been permitted to introduce testimony as to the amount of depreciation of the plant, and for the further reason that the testimony of the said Eichel showed that this was a mere guess on his part and not a statement of facts, nor a statement of matters within his knowledge, all of which appears in defendant's bill of exceptions No. 13 filed herein."

As same appears on page 193 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Thirteen.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Fiftieth Assignment of Error, which is as follows:—

"The contract sued on providing that appellees should produce the ballast at their own cost and should be paid for the same at a fixed sum by appellant, testimony as to the interest paid out on the plant and the amount required to carry on the same by the witness Eichel was immaterial and irrelevant and harmful to appellant, and the court erred in admitting the same."

As it appears on page 194 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Fourteen.

The Court erred in failing and refusing to sustain Appellant's Fifty-first Assignment of Error, which is as follows:—

"The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs herein, over the objection of the defendant, that the plaintiffs had paid out for freight charges 1503 for hauling material and supplies to the plant at Tecolote the sum of \$2280 for the reason that the same was immaterial and irrelevant to any issue in the case, and for the further reason that the evidence showed that the said Wm. Eichel did not have any personal knowledge of the payment of this amount but relied upon books and accounts in his possession, which books and accounts were not made by him and the verity of which was not proven, all of which appear in defendant's bill of exceptions No. 14 filed herein."

As it appears on page 195 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Fifteen.

The court erred in failing and refusing to sustain Appellant's First Proposition under Appellant's Fifty First Assignment of Error, which is as follows:

"In view of the fact that the appellees undertook to produce ballast under the contract for appellant, and the appellant agreed

to pay appellees therefor a specific, fixed amount, to-wit: forty-five cents per cubic yard for the ballast so produced, the amount paid out by appellees for freight charges for hauling materials and supplies was immaterial to any issue in the case and was harmful to appellant, and therefore the court erred in permitting the witness Eichel to so testify over the objections of Appellant".

As it appears on page 195 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Sixteen.

The Court erred in failing and refusing to sustain Appellant's Fifty-Second Assignment of Error, which is as follows:

"The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs, over the objections of the defendant, that the plaintiffs paid out for freight charges over other roads than those operated by the defendant the sum of \$300. for the reason that the same was immaterial and irrelevant to any
1504 issue in the case, and for the further reason that the same was not within the personal knowledge of the plaintiff, Eichel, but was a mere guess on his part based, as far as based on anything else, upon books and accounts not kept by him and the verity of which was not proven, all of which appears in defendant's bill of exceptions No. 15 filed herein.

As it appears on page 196 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Seventeen.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Fifty Second Assignment of Error, which is as follows:

"The contract sued on providing that the appellees should pay all costs of the production of the ballast required to be produced under it, and that appellant should pay a fixed sum for such ballast, the freight charges paid out by appellees in and about the production of said ballast were immaterial and irrelevant, and the court erred in allowing witness to testify to the same."

As it appears on page 197 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Eighteen.

The Court erred in failing and refusing to sustain Appellant's Fifty-Third Assignment of Error, which is as follows:

The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs, over the objections of the defendant, that the plaintiffs had paid out for repairs and material for repairs during the performance of the contract the sum of \$3300. for the reason that the same was immaterial and irrelevant to any issue in the case, and for the further reason that the testimony of the said

Wm. Eichel showed that he had no personal knowledge as to the verity of these figures but relied upon books and accounts which were not kept by him and the verity of which was not proven, all of which appears in defendant's bill of exceptions No. 16 filed herein."

As it appears on page 198 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Nineteen.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Fifty-Third Assignment of Error, which is as follows:

"The contract sued on providing that the appellees should pay all the expense of producing the ballast required to be produced by it and that appellant should only be required to pay for the ballast a fixed amount per cubic yard, evidence as to the repairs and materials for repairs used during and in the performance of the contract by appellees was immaterial and irrelevant and the court erred in permitting the witness Eichel to testify that the amount used for such repairs and materials amounted to thirty three hundred dollars."

As it appears on page 199 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Twenty.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Fifty-Third Assignment of Error, which is as follows:

"The testimony in the case showing that the witness Eichel had no personal knowledge of the correctness of the amount alleged to have been expended by appellees for repairs and materials for repairs, but relied wholly upon books, accounts and memoranda not made by him, and the verity and correctness of which was not established by any other evidence, the testimony of said witness Eichel to the effect that said repairs and materials amounted to thirty-three hundred dollars was hearsay, incompetent and inadmissible and the court erred in admitting same over appellant's objection."

As it appears on page 200 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Twenty One.

The Court erred in failing and refusing to sustain Appellant's Fifth-Fourth Assignment of Error, which is as follows:

"The trial court erred in permitting the introduction by the plaintiffs, over the objections of the defendant, of the bi-weekly pay rolls, purporting to show the amounts paid for labor rendered in the performance of the contract sued on at Tecolote, for the reason that the said pay rolls were not made by the defendant, nor any

one acting for it, and for the further reason that they were not made by the plaintiff, Eichel, during whose testimony on the stand they were admitted, and they were not proven to have been made truly by any person whomsoever, and for the further reason that they were as to this defendant hearsay, and the verity and correctness of which pay rolls were not testified to by any person whomsoever, and for the further reason that they, the said pay rolls, were not testified to by any person whosoever to have represented work actually performed in the discharge of the said contract or necessary to be performed under the said contract, and for the further reason that the said pay rolls did not show to whom the moneys therein purported to have been paid were in fact paid, nor for what purpose, and the truthfulness and accuracy of the same was not supported by the testimony of any person making the same, and for all of which reasons the admission of the said pay rolls was prejudicial to the rights of this defendant and calculated to and did mislead the jury, and for the further reason that the said pay rolls were calculated to mislead and prejudice the jury, and in fact did mislead and prejudice the jury to defendant's injury, as appears in defendant's bill of exceptions No. 1 and to which reference is hereby made."

As it appears on page 201 of Appellant's brief, and for the reasons therein and in that connection stated.

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One Hundred Twenty-two.

The Court erred in failing and refusing to sustain Appellant's Fifty-Fifth Assignment of Error, which is as follows:

"The trial court erred in permitting the plaintiffs to introduce in evidence, over the objections of the defendant, the daily time checks claimed by plaintiffs to evidence the payments for work done and the times for which payments were made under the contract herein sued on, said time sheets being Exhibit No. 49½ for the reason that they were immaterial and irrelevant to any issue in the case, and for the further reason that they were hearsay, and that they were not made by defendant, nor any one acting for it, and the verity and correctness of the same was not proven by the testimony of any person whosoever, all of which appears in defendant's bill of exceptions No. 2 filed herein."

As it appears on page 205 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Twenty-three.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Fifty-Fifth Assignment of Error, which is as follows:

"The daily time checks purporting to evidence the number of employees engaged from day to day upon the work performed by appellees under the contract, which time checks were kept by the employees of appellees and in the keeping of which appellant had no part, were not admissible in evidence, and the absence of the

testimony of the person who kept them that they were kept by him and within his knowledge recorded the facts purporting to be recited therein, or without the testimony of some one that such time checks were made and kept under such person's personal supervision and were known by the person testifying to truly state the facts therein admitted to be set forth, for the reason that without such supporting testimony the said testimony was hearsay."

As it appears on page 205 of Appellant's Brief, and for the 1508 reasons therein and in that connection stated.

One Hundred Twenty-four.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Fifty-Fifth Assignment of error, which is as follows:

"The daily time checks offered in evidence by the appellees and admitted by the court as evidence of the amount of work done under the contract, and the amount of money paid therefor by the appellees, were not admissible for the reason that the contract fixed the amount of compensation to which appellees would be entitled for the performance of the work, and the evidence of said time checks was immaterial and irrelevant to any issue in this case."

As it appears on page 208 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Twenty-five.

The Court erred in failing and refusing to sustain Appellant's Fifty-Sixth Assignment of Error, which is as follows:

"The trial court erred in admitting in evidence, over the objections of the defendant, the pay rolls offered by the plaintiffs and which were admitted as Exhibit No. 49, as shown by defendant's bill of exceptions No. 1 filed herein, because, as shown by the said bill, the testimony was hearsay, and the said pay rolls the privately prepared papers of the plaintiffs, unverified by any person, not proven by the sworn testimony of any person who made the same, or any part of them, or who saw them made, to have been truly made and kept, and the contents of which were not proven by the sworn testimony of any person having knowledge of the facts they purported to show."

As it appears on page 209 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Twenty-six.

The Court erred in failing and refusing to sustain Appellant's First Proposition to its Fifty-Sixth Assignment of Errors, which is as follows:

"The pay rolls purporting to evidence the number of employees engaged from day to day upon the work performed by appellees under the contract, which pay rolls were kept by the employees of

appellees and in the keeping of which appellant had no part, were not admissible in evidence, and the absence of the testimony of the person who kept them that they were kept by him and within his knowledge recorded the facts purporting to be recited therein, or without the testimony of some one that such pay rolls were made and kept under such person's personal supervision and were known by the person testifying to truly state the facts therein admitted to be set forth, for the reason that without such supporting testimony the said testimony was hearsay."

As it appears on page 210 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Twenty-seventh.

The Court erred in failing and refusing to sustain Appellant's Fifty-Seventh Assignment of Error, which is as follows:

"The trial court erred in permitting the witness W. L. Miller, introduced by the plaintiffs, to identify and testify to the correctness of Exhibit No. 49½ claimed to be the daily time sheets of the plaintiffs, for the reason that the said Miller showed by his testimony that he did not have any personal knowledge of the correctness of the same, and his testimony with reference thereto was hearsay, and, in particular, that he was not present and had nothing to do with the making and verifying of the same, the latter ones not being identified or segregated, as shown by defendant's bill of exceptions No. 4 filed herein."

As it appears on page 210 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Twenty-eighth.

1510 The Court erred in failing and refusing to sustain Appellant's First Proposition under its Fifty-Seventh Assignment of Error, which is as follows:

"The court erred in permitting W. L. Miller, a witness on behalf of the appellees to testify to the correctness of the daily time checks described in the record as "Exhibit No. 49½" for the reason that it appeared from the testimony of the said Miller that he did not have personal knowledge of the correctness of the same, that he was not present at the making thereof and had nothing to do with the making and verifying of all of same and that he only knew as to some of said time checks and as to some he did not know, and as to which he knew of and which he did not he was unable to testify, therefore, said testimony was hearsay."

As it appears on page 211 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Twenty-ninth.

The Court erred in failing and refusing to sustain Appellant's Fifty-Eighth Assignment of Error, which is as follows:

"The trial court erred in overruling defendant's general demurrer contained in defendant's first amended original answer to the first amended original petition of the plaintiffs."

As it appears on page 213 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Thirtieth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Fifty-Eighth Assignment of Error, which is as follows:

"The Court erred in overruling the appellant's general demurrer to the first amended original petition of the appellees, for the reason that the certificate of the appellant's Engineer of Maintenance of Way in the performance of the work contracted for was a condition precedent to the recovery on the contract price, and the first amended original petition not having contained an averment of the
1511 completion of the work under the contract and a certificate of the Engineer of Maintenance of Way to that effect, it was insufficient to support a judgment."

As it appears on page 213 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Thirty-first.

The Court erred in failing and refusing to sustain Appellant's Fifty-Ninth Assignment of Error, which is as follows:

"The trial court erred in not sustaining Special Exception No. 13 contained in defendant's first amended answer to plaintiffs' first original amended petition."

As it appears on page 214 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Thirty-second.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Fifty-Ninth Assignment of Error, which is as follows:

"It appearing upon the face of appellees' petition, and the copy of the contract sued on attached thereto and filed therewith that it was agreed between the appellees and the appellant that the appellees were to be paid by appellant from month to month upon estimates made by the Chief Engineer, or his authorized agent, ninety per cent of the value of the work, labor and material done, performed and furnished by the appellees during the preceding month and that ten per cent. thereof should be retained by the appellant until the whole of the ballast which appellees had agreed to furnish the appellant was delivered by the appellees, when the said ten per cent. so retained with all other payments that then might be due and payable to the appellees from the appellant under such agreement should be paid upon the appellees obtaining a certificate from the appellant's Engineer of Maintenance of Way that the appellees

had acceptably discharged all of their obligations under such agreement, and said petition not alleging that the appellant's Engineer of Maintenance of Way has ever made any such certificates, 1512 said petition is sufficient and the court erred in not sustaining appellant's 13th exception thereto."

As it appears on page 214 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Thirty-third.

The Court erred in failing and refusing to sustain Appellant's Sixtieth Assignment of Error, which is as follows, to-wit:

"The trial Court erred in not sustaining Special Exception No. 14 contained in defendant's first amended original answer to plaintiff's first amended original petition."

As it appears on page 217 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Thirty-fourth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under the Sixtieth Assignment of error, which is as follows:

"The Plaintiffs' Original Petition was insufficient in law and too vague, indefinite and uncertain to enable appellant to properly answer thereto, for the reason that it was provided in said contract, and as it appears upon the face of plaintiffs' petition, in substance as follows: 'The decision of the Company's Engineer of Maintenance of Way shall be final and conclusive in any dispute which may arise between the parties to this agreement (referring to the agreement sued on) relative to or touching the same; and each of the parties hereto waives any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants herein so that the decision of the said Engineer of Maintenance of Way shall, in the nature of an award, be final and conclusive on the rights and claims of said parties,' and said petition does not show that the said appellant's Engineer of Maintenance of Way has ever decided the alleged rights and claims of the said appellants as contained in said 1513 petition, and therefore the court erred in not sustaining Special Exception No. 14 contained in appellant's Amended Original Answer."

As it appears on page 217 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Thirty-fifth.

The Court erred in failing and refusing to sustain Appellant's Sixty-First Assignment of Error, which is as follows:

"The trial Court erred in not sustaining Special Exception No.

14c contained in defendant's first amended original answer to plaintiffs' first amended original petition."

As it appears on page 218 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Thirty-sixth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Sixty-first Assignment of Error, which is as follows:

"If appellant ever made any agreement with the appellees to ship commissary supplies over its road for appellees free of charge, such agreement was contrary to law and public policy and void, and therefore it was error on the part of the court not to have sustained said Special Exception No. 14c contained in Defendant's Amended Original Answer."

As it appears on page 219 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Thirty-seventh.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Sixty-First Assignment of Error, which is as follows:

"It was not alleged or shown in said petition that there was ever any consideration paid to or received by appellant for any contract to ship free commissary supplies over its line for appellees, and therefore the court erred in not sustaining appellant's Special Exception No. 14c contained in its amended original answer."

1514 As it appears on page 220 of Appellant's Brief, and for the reasons therein and in that connection stated.

One Hundred Thirty-eighth.

The Court erred in failing and refusing to sustain Appellant's Third Proposition under its Sixty-First Assignment of Error, which is as follows:

"It appearing upon the face of appellees' petition and the copy of contract attached to and made a part of the same that the appellant nowhere agreed to haul commissary supplies free for appellees, and it appearing that the whole contract between the parties was reduced to writing and contained in this written agreement, it was error on the part of the court not to have sustained said Special Exception No. 14c contained in appellant's First Amended Original Answer."

As it appears on page 220 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Thirty-ninth.

The Court erred in failing and refusing to sustain Appellant's Sixty-Second Assignment of Error, which is as follows:

"The trial court erred in its general charge to the jury in instructing them that, under the written contract sued on and in evidence before them, the defendant agreed to erect at its quarry at Tecolote, New Mexico, a crushing plant with an average capacity of 750 cubic yards in ten hours, broken in the crushers to the maximum sizes that would pass through a three inch ring, the undisputed evidence showing that the defendant did not agree to erect a crushing plant with an average capacity of 750 cubic yards in ten hours or any other average capacity whatsoever."

Wherefore, premises considered, the Appellant prays that the judgment of affirmance be set aside and the judgment of the District Court of El Paso County, Texas, be reversed and the cause remanded.

1515 The Counsel for Appellees are Richard F. Burges, who resides at El Paso, El Paso County, Texas, and Davis & Goggin, who reside at El Paso, El Paso County, Texas, the Post Office of all of them being El Paso, Texas.

HAWKINS & FRANKLIN AND
TURNER & BURGESS,
*Attorneys for Appellant, The El Paso &
Southwestern Railroad Company.*

(Filed in the Court of Civil Appeals, at San Antonio, Texas, July 5, 1910.)

Order Overruling Motion for Rehearing.

(Wednesday, Oct. 5th, A. D. 1910.)

4329.

EL PASO & S. W. R. R. Co., Appellant,

vs.

EICHEL & WEIKEL, Appellee.

Appeal from District Court El Paso County.

The motion of appellant for a rehearing filed July 5, 1910, coming on to be heard and the court having duly considered the same, it is ordered that said motion be and it is hereby overruled; it is further ordered that appellant El Paso & South Western Railroad Company and its sureties Joshua S. Raynolds and J. M. Raynolds pay all costs of this motion.

Petition for Writ of Error.

In the Supreme Court of the State of Texas.

No. —.

EL PASO & SOUTHWESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
EICHEL & WEIKEL, Defendants in Error.

Appeal from the District Court of El Paso County, Texas.

1516 Judgment Affirmed by the Court of Civil Appeals of the
Fourth Supreme Judicial District at San Antonio, Texas,
June 22nd, 1910, and Appellees' Motion for a Rehearing Over-
ruled October 5, 1910.

Application for Writ of Error.

To the Honorable Supreme Court of the State of Texas:

Your petitioner the El Paso & Southwestern Railway Company respectfully represents that in the above styled and numbered cause on the 22nd day of June, 1910, the Court of Civil Appeals at San Antonio, Texas, affirmed the judgment of the court below in said cause, for \$30,000, and, thereafter, in due time, your petitioner filed its application for a rehearing in said Court of Civil Appeals, which application was thereafter, on the 5th day of October, 1910, overruled and denied.

Your petitioner now applies to the Supreme Court for a writ of error to the end that said court may review said cause and the action of the Civil Court of Appeals therein, and correct said action, and as reasons and grounds for the granting of said writ of error, your petitioners assign the following errors committed by the Court of Civil Appeals in affirming said judgment and in refusing a rehearing, to-wit:

I.

The Court of Civil Appeals erred in sustaining that part of the charge of the court below which is assigned as error by appellant in its first assignment of error in which charge the court below instructed the jury that the defendant guaranteed that the rock crushing plant furnished by defendant to plaintiffs had a maximum capacity of crushing 1,000 cubic yards of rock in ten hours, whereas the contract mentioned the capacity of the crusher merely by way of description and did not warrant its capacity.

Statement.

The material parts of the contract on this subject are as follows:

1517 "The Company agrees to deliver to the Contractor without charge the following crusher and quarry equipment all new, viz:

"One complete crusher plant ready for operation and consisting of one No. 7½ and one No. 5 gyratory Austin Crusher, 1 ballast bin, 1 engine and 1 boiler plant, this entire crusher plant to be erected complete at the quarry and capable of crushing 1000 yards of ballast in ten hours; also, 2 No. 3½ steam drills, 1 steam boiler with steam pipe and steam hose for drilling the quarry and one small duplex pump with pipe connection for water supply. (Tr. of Record p. 33).

"The Contractor agrees to take this equipment provided by the Company, run it, maintain it in good, efficient condition, and, on completion of the work under this agreement or its termination by the Company, return the entire equipment in good condition, less ordinary wear and tear, to the Company without expense to the latter.

"The Contractor (appellee) agrees that he will provide whatever additional equipment that may be found necessary to secure and maintain the average daily output of 750 cubic yards of ballast per working day without expense to the Company (appellant)." (Tr. of Record pp. 33 and 34.)

A full statement of the facts surrounding the execution of the contract is given in statement to appellant's first assignment of error, pages 42 and 45.

Argument.

The fact that appellant contracted to furnish a crusher by name of certain maximum capacity of 1,000 cubic yards, that is one classed of such capacity, and required appellees to so operate it as to produce an average of 750 cubic yards per day, and the

1518 agreement of appellees "that he will provide whatever additional equipment that may be found necessary to secure and maintain the average daily output of 750 cubic yards" at the contractor's expense, when taken in connection with the parol evidence as to the surrounding circumstances under which said contract was made—showing as it does that the crusher and equipment were already on the ground when the contract was made having been installed in part by appellant for its own use, and had been seen by appellees—makes the intent of the parties clear that appellant agreed to furnish the grade of Austin manufactory and equipment named by said manufacturers as having a maximum capacity of 1,000 cubic yards per day which was on the ground, and knows to both parties, and that if it will not so operate as to produce an average of 750 cubic yards per day, the contractor will provide all necessary additional equipment to make it do so.

The requirement that the maximum capacity should be 1000 cubic yards per day was not a material requirement, further than compliance with this requirement would tend to secure a crusher which would produce on an average 750 cubic yards of ballast per day, and there was no guaranty by appellant that the crusher on

the ground with reference to which the parties contracted, would produce on an average 750 cubic yards per day; on the contrary, it was clearly contemplated by the parties to the contract that it might not, and hence the necessity of making provisions to bring it up to the point of average production which appellant required appellees to produce.

This being the true construction of the contract, the provision as to a crusher of maximum capacity of 1,000 cubic yards was not a material provision, and will not therefore raise an implied warranty or condition precedent. The average capacity for 750 cubic yards per day which might be produced with a crusher of less than 1000 cubic yards maximum capacity was the only material provision as to capacity, and the undertaking of appellees was
1519 to bring it up to that capacity if anything more was needed than the crusher on the ground and its equipment to bring it up to the required, not to the maximum, capacity.

I (a).

The Court of Civil Appeals erred in not sustaining appellant's second proposition under second assignment of error, complaining of the charge of the court below to the effect that appellant agreed to erect a crushing plant that would produce on an average 750 cubic yards of crushed rock per day and guaranteed and warranted that capacity of the crusher furnished. (Brief page 49.)

Argument.

If there is any implied warranty or condition precedent at all in the contract, it is only that the crusher should have a maximum capacity of 1000 cubic yards per day. Now unless it can be said that a crusher which has the maximum capacity of 1,000 cubic yards per day would necessarily have an average capacity of 750 cubic yards, then there is no implied warranty or guaranty that the crusher should have an average capacity of 750 cubic yards per day. It is matter of common knowledge that machinery cannot be run all the time at its maximum capacity. No machinery is ever intended to be operated regularly at its maximum capacity. The maximum capacity is merely a safety point beyond which the machine must never be worked. Then if a contract for a machine that will produce 1000 cubic yards of crushed rock when run at its maximum capacity, is not necessarily a contract for a machine that will produce on an average 750 cubic yards per day, there is no contract that the machine on the ground which appellant contracted to furnish would necessarily have any such average capacity; this is apparent from the stipulation that the contractor should "provide whatever additional equipment that may be found necessary to secure and maintain the average daily output of 750 cubic yards of ballast per working day without expense to the company (appellant)."

1520 If appellees' position is correct, this last quoted provision would be inoperative for any purpose in the contract; for

it is not predicated upon a failure by appellant to perform its contract, but contemplates the possibility of additional equipment after appellant has furnished the very crusher which is on the ground and is known to the parties, and with reference to which the contract was made.

II.

The Court of Civil Appeals erred in not sustaining appellant's fifth assignment of error and the second proposition under fourth assignment of error, (Brief, Pages 52-53-56) to the effect that plaintiffs not having performed their contract, could not, upon the part performance alleged by them, recover as their measure of damages the profits which they would have made on the part of the work done and upon that not performed if defendant had fully complied with its obligations under the contract. The Court of Civil Appeals erred in that it held that appellant prevented further performance and that, therefore, said measure of damages was available to appellee, whereas the circumstances under which appellees ceased work do not justify the legal conclusion that appellant prevented further performance in any such sense as to make said measure of damages available.

Propositions.

The following propositions will demonstrate the error of the Court of Civil Appeals in sustaining this charge:

First. The contract was an entire one.

Second. The partial breaches of the contract by appellant were not such as will be treated in law as preventing full, substantial performance of the entire contract by appellees.

Third. The measure of damages available for a contractor who performs a part of an entire contract, who voluntarily abandons the work without the consent of the employer, was not the profits the contractor would have made on the part of the contract
1521 performed if the employer had fully performed but was
the value of the services actually performed to the employer
less the damages caused to the employer by the failure of the contractor to fully perform the contract.

First Proposition.

As the contract was for a minimum of 200,000 cubic yards of crushed rock, which one of the parties acquired the right to provide and was obligated to furnish and the other required this amount and was obligated to pay therefor, and each was required to spend large sums of money for equipment, and importation of labor from other states was contemplated, and the contractor was under limit as to time of performance and liable to penalties for delays, was under bond conditioned for entire performance with provisions in the contract for the right of the employer to complete performance at the expense of the contractor if he failed of complete performance, the contract was entire.

Argument.

First, as to the contract being entire.

The fact that a contract is divided into installments for payments does not render it severable, but whether it is entire or not depends upon the intent of the parties as to mutual requirements of performance, as an entire job or piece of contract work. One illustration of an entire contract notwithstanding the performance was divided into partial performance and payments, is noted by Mr. Sutherland on Damages, in Section 708, wherein Mr. Sutherland says:

"But a contract which has for its object the cutting and peeling of the timber on certain land, the curing of the bark and loading it on the cars, the teaming and cutting the timber into long lengths and its delivery on or before a fixed date, is a single undertaking, the price being entire, notwithstanding, for convenience payments were to be made and apportioned to the several items of work as it progressed, and a condition for the reservation of ten per cent of the contract price until the work was completed."

The author proceeds further in the same connection as follows:

"In New York a contract had been made by the plaintiff to make for the defendant three or four models of a mowing machine without delay; no price had been agreed on nor when the models should be paid for. It was held that the contract was entire for three models, and the plaintiff having made and delivered one only was not entitled to recover for it, although it had been accepted. And in *Stevens vs. Baird* it was held that where one party agreed to saw by a given time 300,000' of boards at a stipulated price per thousand, and failed to saw the whole quantity, that though he had sawed 144,000' which had been received by the other party, compensation for sawing this quantity could not be set off against claim for damages for the omission to saw the residue."

The case last cited by Mr. Sutherland is in 4th Wend. 604.

A contract for all necessary excavation for a certain building according to specifications at the rate of 40 cts. per cubic yard of rock removed was held to be an entire and not a divisible contract.

"*Toher vs. Schaefer*, 91 N. Y. S. 3.

An executory contract is entire if it can be determined as to time by some definite limitation, as to quantity by measurement, and as to price by arithmetical computation.

Hale vs. Brown, 59 N. H. 661; 47 Am. Rep. 224.

A contract to furnish a certain advertising space in the three programs of three theaters during the theatrical season, at a gross sum per week, is entire.

Hazzard vs. Hoxsie, 53 Hunn. 417.

A contract "to pay for three — ten dollars per month until we finish our contract on a railroad" is an entire contract.

1523 *White vs. Brown*, 47 N. C. (2 Jones) 403.

Where parties intend to have new machinery made, and old machinery repaired, for a single purpose, a contract is entire.

The Wellsville vs. Beisee, 3 Ohio St. 333.

A contract providing for extensive public works and for forfeiture of 15 per cent of contract price for failure of complete performance is entire notwithstanding payment for work done is to be made in installment.

Gransman vs. Bowen, 32 N. J. 243.

Argument on Second Proposition.

The proposition in support of the main one, to the effect that the partial breach of the contract by plaintiff with reference to the capacity of the crusher and the quality of the water and coal, were not such as to defeat the contract, is sustained by the conclusion of the Court of Appeals in the case at bar in its holding that the failure of appellant to furnish a crusher of the exact maximum capacity described in the contract was not so vital as to amount to a condition precedent.

The Court of Civil Appeals having held that the stipulation as to the maximum capacity of the crusher, which the plaintiffs should have furnished was not taken as a condition precedent to the contract which appellant's failure to perform would have discharged, but was "merely as collateral to the contract and therefore was properly designated and considered by the court as a warranty for the breach of which defendant was liable for all the damages that proximately ensued to plaintiffs therefrom." (Opinion, Page 33). It must follow that the failure to furnish a crusher which would measure up to the exact maximum capacity expressed in the contract did not amount to a prevention of full performance by plaintiffs of their contract; and much less would the court be justified in holding that

the mere inconvenience and some smaller output per day resulting from inferior water and coal which was the best that defendant could obtain in the locality of the work, would amount to a prevention of full performance of the contract so as to enable plaintiffs to sue for the profits they would have made on the work done if defendant had furnished a crusher of the prescribed maximum capacity and suitable water and coal.

The same conclusion that appellant did not prevent full performance by appellees, is reached through another line of reasoning: Take the rule as to sales of personal property, machinery, etc., which the Court of Civil Appeals applies by analogy to the requirement as to the capacity of the crusher, and follow the analogy a little further. If the crusher had been sold to appellees, and they, after testing the same, and finding it did not quite come up to the capacity represented or warranted, but, upon making tests and becoming aware of the deficiencies the purchaser did not promptly rescind and notify the seller thereof, but continued to use the crusher, he would be held to have elected to stand on the contract and sue for damages after complete performance of his contract, and could not thereafter justify a failure to fully perform his contract of purchases by paying say in labor a specified job of work. The same is true as to the quality of coal and water which appellant was furnishing and which alone it was evident they were bound to furnish. After using the crusher and water and coal long enough to fully understand the extent to which these hindrances curtailed the output, plaintiffs elected

not to rescind and went on with the performance, presumably relying on their right of action for damages if they were entitled to any upon full performance of their contract. After thus electing to perform the original grounds of rescission, if any existed, were no longer available to plaintiffs, and those complaints could not thereafter be held to operate as a prevention of full performance by plaintiffs.

In *Scalf vs. Thompson*, 61 Tex. 476, the Court with reference to an attempted rescission by a purchaser of sale of machinery 1525 which the purchaser had continued to use after having discovered its defects, the Court said:

"From his plea it appears that whilst he offered to rescind, yet at request of plaintiff he retained the machinery and used it, plaintiff agreeing to pay him damages for any loss he might sustain by reason of the failure of the machinery to come up to contract. Had he rejected this proposition and not used the property, he would have been in a condition to set up his claim for the purchase money already paid; but having accepted it and used the property, he cannot, after sale, under the mortgage, renew the offer to rescind and get the benefit of it in his pleadings."

Philip, etc. Construction Company vs. Seymour, et al., 91 U. S. 646.

In *Hutchins vs. J. E. Case Threshing Machine Company*, 35 S. W. 60, wherein this court refused a writ of error, the court said:

"The rule in such case is, we understand it, that an acceptance after the trial precludes the vendee from rescinding the contract, etc."

Altman and Taylor Co. vs. Hefner, 67 Texas, 55, was a case wherein there was an express warranty, as the Court of Civil Appeals held to be true of the case at bar—but this court there held receiving machinery and failing to rescind after knowledge of defects, waive their right of rescission, though an action on the warranty might be sustained after the performance of the contract. All we contend for here is that the appellees so far waived the right of rescission because of partial breaches of the contract as to effectiveness of the machine-, fuel, and water furnished, that they could not further claim that this partial breach which had been passed over by appellees, afterwards prevented them from full performance—after waiving rescission they were bound to proceed according to contract and to fulfill the contract in order to place themselves in a position 1526 to sue on the warranty if they had one. They abandoned the contract after electing to perform, and without new cause, and therefore should not be permitted to sue on the warranty of the capacity of the machinery and quality of fuel and water upon part performance of an abandoned contract. Their measure of damages must be that which is available to one who abandons a contract after part performance.

But again the plaintiffs allege that defendant, about August 1, 1906, exercised its option under the contract, and agreed to take 300,000 maximum amount, thereby showing their agreement on August 1, 1906, to go on with the contract for the production of an additional 100,000 cubic yards. Here is an express averment by

plaintiff- of their election to stand on the contract and to waive re-scissions after over eight months' experience under it, and with no prospect of a change of condition, at least none is alleged.

If the inconvenience and additional expense caused by appellant's partial failure to completely perform entirely its obligations did not operate to prevent plaintiffs from performing at that time, why did it prevent them from further performance as soon as they re-adopted the contract as applied to an additional 100,000 cubic yards of ballast, and seized the opportunity to speculate over prospective profits on this additional amount.

The fifth paragraph of the charge of the court throws down to them this feast over prospective profits on work which was never done, and *given* them the advantage of waiving any grounds of rescission they may have had long enough to permit appellant to step a little deeper into the dangerous possibility of this untoward contract, and then permits them to throw down the contract after part performance for alleged prevention of performance by appellant through negative partial breaches of contract which appellees never before regarded as sufficiently serious to amount to a prevention of performance by them. If there is anything in the rules of
1527 the law that hold a contractor to performance of a contract after he has elected to stand on the contract, notwithstanding partial breaches thereof by the other party, and to seek his remedy in an action for damages, after full performance, the uncontroverted facts of this case certainly appeal most strongly to the enforcement of those rules. The temptation to throw down a contract for light causes, when all the prospective profits may be recovered, without the worry, risk, and responsibility of performing the contract, are great, and may account for this blowing hot and cold by appellees—hot until they get in the way of prospective profits on an additional 100,000 cubic yards of ballast, and cold long enough to reap the prospective profits without earning them, or having the risk and responsibility thereof.

In *Blake vs. Pine Mountain Iron and Coal Company*, U. S. C. C. A., 76 Federal, 624, it was held that the fact that a party had not performed his contract, even according to its legal effect, does not necessarily entitle the other party to a rescission, if either or both have partly performed, and circumstances of embarrassment have thereby arisen to make it impossible to restore the status quo.

As to what is deemed in law a prevention by the employer of full performance by the employé, we call attention to some decisions:

In *Cox vs. McLaughlin*, 54 California, 605, the court quoted from *Palm et al. vs. O. & M. & R. Co.*, 18 Illinois, 219, with approval, the following:

"I have examined all the authorities referred to by counsel and have made diligent search myself, but have found no case where the plaintiff has been allowed to recover the losses sustained by not being permitted to complete the contract, unless he has been prevented from going on with his work by a positive affirmative act of the other party, or where the other party has neglected to do some act, without

which the plaintiff could not, in the nature of things, go on with his contract; as where he refused to furnish a place whereon to erect a building, or to furnish material which by the contract was to be put in the work and which was to be provided by him. In such a case the act to be done is clearly a condition precedent and indispensable to enable the other party to go on."

Wells vs. National Life Association of Hartford, 39 C. C. A., 476, 99 Federal, 222, is reported again in L. R. A., vol. 53, page 1, to which is appended an extended note, and under the sub-heading J, "What amounts to prevention of performance," a collection of cases which are instructive on this point is made under the above head. The cases noted all seem to hold that the acts of the employer, when treated as preventing performance by the employé, must consist of intentional obstructions to complete performance, or to a course of conduct *is* merely negative and consists only in failure to perform any certain parts which are not indispensable to performance by the employé, but which inconvenience him in his work and render it less profitable, they are not deemed to be acts which prevent complete performance by the employé so as to justify him in abandoning the contract and suing for damages on the basis of one who has been prevented by the employer from completing his contract. He must perform the contract and sue on it upon allegations of performance for damages arising from actual breaches by the employer.

In Lake Shore & M. S. Ry. Co. vs. Richards, 38 N. E. (Ill.), it was said with reference to the contract of a railroad company to deliver to a transportation company to be weighed and transferred, grain, where the railroad company diverted the grain so as to intentionally practically defeat the objects of the contract, that it amounted to the prevention of performance by the transportation company which permitted the transportation company to sue for the profits it would have made. And in the course of the opinion, numerous authorities are collated, both English and American, all of which tend to establish the proposition that the employer must engage in such a course of conduct as defeats the contract by interrupting its performance on the part of the employé in order to be deemed as preventing performance. A course of conduct is required, in other words, which indicates that the employer repudiates the contract and seeks to interrupt its further performance. Anything less relegates the party abandoning the contract to his remedy for the value of his work to the other party less the damages caused by the breach.

Mr. Sutherland on this subject says:

"But in the absence of any interference of the employer with the contractor, any refusal to be bound by the contract, consent to the abandonment of it, or such like conduct, the mere failure to pay an installment due, though a breach of the contract giving the right to sue therefor and recover the sum due, is not such a breach as authorizes the abandonment of the work, and the bringing of a suit to recover the profits which would have been earned had the contract been fully performed. To justify such recovery the contractor must

show willingness to complete the contract and refusal of the employer to be further bound by it, or his abandonment of it."

In *William Wharton, Jr., & Company vs. Winch*, 35 N. E., 589, the Court of Appeals of New York, in passing upon the failure to pay an installment for work when due, as to whether such failure of performance in part justified the other party in abandoning the contract said:

"In view of the structure of this contract, it would seem to be clear that the mere failure of the defendant to make punctual payment of an installment due, according to its provisions were not such a breach of the entire contract as to permit the plaintiff to refuse to proceed under it, and recover damages for the profits which he would have earned had the contract been fully performed on his part. * * *

1530 The Court in the same case further said:

"In *Moore vs. Taylor*, 42 Hun., 45, the plaintiff sought to recover prospective profits on the failure to pay an installment under a contract for railroad construction, similar in its important features to the one before us, and it was held by the general term of the 5th department, Judge Bradley delivering the opinion of the court, that mere default in the payment of an installment when it becomes due, is not such a denial of the right of the contract, or to continue in the performance of the service, as in legal effect to constitute a breach of the entire contract. Such a failure is not of itself equivalent to a refusal on the part of the defendant to be further bound by the contract, or to an abandonment of its provisions by him. This rule was clearly recognized by this court in *Nicholson vs. Steel Company*, 137 N. Y., 473, 33 N. E., 561, where it was held that under a contract to deliver iron in specified portions monthly, the delivery for each month to be paid for on the 27th of the following month, the refusal to be further bound by the terms of the contract, or to accept further deliveries and to give notes already demandable, and to give any more notes at any time, or for any purpose in the future, to pay moneys at any time which were eventually to be paid at any time under the contract,—that all these things constituted a breach of the contract as a whole and gave a present right of action to recover damages sustained thereby."

In *Luce vs. New Orange Industrial Association*, 68 N. J., Law 31, 52 Atlantic, 306, the court held that a failure to perform one of several subsidiary acts required by contract did not authorize a rescission, and in this case the following quotation is made from Lord Mansfield in an English case:

"The distinction is very clear where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part—where a breach may be paid for in damages—there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent."

And the court held that partial failure only of performance did not authorize a rescission of the contract.

The court, after making this quotation, further said:

"The weight of authority is that a failure to perform a subsiding part of the contract will support an action for damages, but will not justify a rescission of the contract, unless the conduct of the party in default be such as to evidence an intention to abandon the contract, or a design no longer to be bound by its terms."

Citing authorities.

In the case at bar, appellant furnished a rock crusher nearly, but not quite, up to the requirements of the contract, but supposed it to be entirely up to requirements as to maximum capacity; the appellees after inspecting it accepted it as up to requirements; the appellant furnished the best water and coal attainable in the locality where the work was to be done, and on finding the water bad, furnished a compound for treatment of the water. The appellees could operate the equipment and complete the contract, though at some greater cost than they would have incurred if the fuel and water had been first class. They elected to do so after full trial of the plant under these conditions. They continued performance for months. Appellant elected under the terms of the contract to embrace in it 100,000 additional cubic yards of ballast. Appellees acquiesced in this extension of the contract and sue for profits they say they would have made on this additional 100,000 cubic yards. Later on, without any wish on the part of appellant for them to cease performance, but after appellant had shown its desire for full performances by aiding appellees as far as it could to overcome the additional expense caused by a partial, unintentional shortcoming on appellant's part, appellees stop performance under the contract and sue for profits prospective, as well as for what they allege they 1532 would have made on work performed if appellant had fully performed. The status quo cannot be restored. Large investments made to have the contract carried out have been made by appellant which cannot be restored by it.

In conclusion, it seems that we have a plain case wherein the appellees should not be permitted to occupy the attitude as to measure of damages of a part performance by a contractor who has been prevented from full performance by the employer, but we have a case wherein the appellees, in order to maintain a suit for damages, must allege and prove the value of what they did in the hands of the appellant. They cannot sue on the contract for profits they might have earned if they had fully performed, but must sue on the quantum meruit for the value to appellant of the fruits of what they did.

Third Proposition.

When a contractor after part performance of an entire contract, ceases further performance, when not prevented from further performance by those acts which are deemed in law to amount to a prevention of further performance, and when further performance is not interrupted by agreement of the parties, or unavoidable conditions, rendering further performance impossible, the measure of damages established by Texas authorities is the value of the work

done to the employer, and not either the expense or profits on the work done which the contractor might have made on the work actually done as a part or full performance if he had fully performed his contract, and the employer had also fully performed.

This is the settled rule in Texas. In *Weis vs. Devlin*, 67 Texas, 512, the Supreme Court quotes with approval from *Carroll vs. Welch*, 26 Texas, 149, as follows:

"According to the modern decisions and the decisions of this court, the rule appears to be, that if the employé abandons his contract, the employer shall be charged with only the reasonable worth, or the amount of benefit he has received upon the whole transaction, and in estimating the amount, the contract price cannot be exceeded. The former is allowed to recover for his part performance its reasonable worth, not to exceed the contract price, and the latter to recoup or reconvene his damages for the breach of contract by the former."

In *Hilliard vs. Crabtree*, 11 Texas, 267, the court said:

"The court, in its charge, instructed the jury, that the plaintiff was entitled to recover for the work actually performed, what it was worth, and at the rate he was to receive for the entire work, had he completed the job according to his contract with the defendant. The defendant contends, and prayed the jury to be so instructed, that the measure of plaintiff's recovery was the amount of the contract, less the reasonable and fair amount defendant had to pay for completing the job. And we are of the opinion that the rule, as contended for by defendant, was the true criterion by which the rights of parties should have been adjusted.

"The presumption is that the defendant has suffered damage from the failure of the plaintiff to perform the contract. He was not at liberty, however, to reject the work done, and refuse to make any payment. He had already accepted the work, as it progressed. It was beneficial to him; and he was liable for its value."

In *Batsell vs. St. Louis A. & T. Ry. Co.*, 23 S. W., 553, the Court said:

"The remaining point to be settled is as to the extent of appellant's right of recovery, and whether or not his pleadings are sufficient on this point. The contract in this case constitutes, we think, what is known as an 'entire' contract. The common law rule in such a case is: 'A party to an entire contract, who has partially performed it, and subsequently abandons the further performance according to its stipulations voluntarily, and without fault on the part of the other, or his consent thereto, can recover nothing for such part performed.' This doctrine has been modified in this state to the extent that, though the contract is entire in its character, if a party abandons his contract after part performance, he is only entitled to compensation for the benefit bestowed on the opposite party, or on others, if within the contemplation of the contract others are included."

To the same result are *City of Sherman vs. Conner and Oliver*, 88 Texas, 35; *Childers vs. Smith*, 90 Texas, 610.

The charge complained of in these assignments as giving an erro-

neous measure of damages, was subject to the further objection, that it authorized a recovery of all outside profits, without requiring the jury to make any deduction for the care, trouble, risk, and responsibility that they were relieved from by non performance.

III.

The Court of Civil Appeals erred in not sustaining appellant's fifty-eighth assignment of error, (Brief, page 213) wherein appellant complains of the error of the court below in overruling defendant's general demurrer to plaintiff's petition for the reason that there were no such averments in said petition as entitled plaintiffs to recover for profits they would have made and no averments to support any other measure of damages.

Proposition.

As the petition did not allege facts showing that defendant prevented full performance so as to make available to plaintiffs the profits they would have made on part performance, nor make an allegation of value to the defendant of the part performance, it contained no pleadings of facts that would render available any measure of damages, and it was for that reason subject to the general demurrer.

Statement.

The petition alleged the obligation of defendant to furnish 1535 the crusher of maximum capacity stated in the contract and the obligation to furnish suitable water and coal, and defendant's partial failure to perform entirely its obligations, but as shown by propositions under next preceding assignment of error in this court, these averments were not sufficient to show that defendant prevented full performance by plaintiffs of their contract.

The petition laid much stress on the inclement weather, but there was no stipulation in the contract about the weather, except one exempting plaintiffs from penalties for failure to operate the plant when weather conditions would not permit (Brief, top of page 24) which shows that unfavorable weather conditions were contemplated by the parties and provided for in the contract.

IV.

The Court of Civil Appeals erred in sustaining the ruling of the court below in admitting in evidence over objection of appellant the expenses of equipment, and operation of the plant by appellees, consisting of horses, tents, lubricating oils, food for stock, railroad fare for hands, and especially the payroll showing amounts paid for labor, and in overruling appellant's assignments of error from forty-first to fifty-seventh inclusive, wherein each separate item of expense is made the subject of an assignment of error.

First Proposition.

As the plaintiff contended and adduced evidence tending to show that the cost of operating the plant was in fact much greater than it would have been if defendant had complied with its contract but did not offer to show what the expense of operating would have been if defendant had strictly complied with its contract, the cost of equipping and operating the plant as it was did not tend to show what the profits would have been with a crusher of greater capacity, and suitable water and coal, and such evidence was, therefore, 1536 immaterial and irrelevant and was calculated to confuse the jury by impressing them with the fact that they were supposed to make some use of these figures or the court would not have overruled objections to them and admitted them in evidence. The only evidence as to the profits which appellees would have made if appellant had fully performed its contract, consisted of estimates, or opinions of one of appellees, and witness Campbell, which is set out in appellees' brief, pages 71 and 27, and which does not give any items of expense upon which their estimate is based, so as to compare such items with greater expense of operating as they did operate.

Second Proposition.

The contention of appellees that this testimony was admissible to rebut allegations of defendant of negligent operation of the plant is untenable for the reason that much of this testimony was as to equipment, depreciation in value thereof, transportation of labor from another state, interest on investment, payroll of \$690.00 per day for days when the weather was too inclement for the work; which were not expenses of operating the plant. The negligence alleged by appellant was as to the operation of the plant and not as to the equipment of appellee. The court in its charge (paragraph 3) limited the question of negligence, as did the pleading, to "reasonable care, management and diligence with the force and equipment furnished by them and used in the operation of said plant."

Third Proposition.

In any event it was error to admit in evidence the testimony as to the large pay roll of appellees, in the face of allegations by them that during the winters of 1906 and 1907, appellees were compelled to suspend operations owing to inclement weather, but paid out \$690.00 per day for labor kept in waiting (Brief, page 13). This testimony could throw no light on the profits appellees were prevented from making by reason of deficient capacity of the crusher or inferior coal or water.

1537 Nothing was recoverable from appellant because of damages resulting from inclement weather, as the contract took notice that the weather would be so inclement at times as to prevent operating the plant, and made provision for that contingency by providing that no penalties for delays in operating should be incurred during such periods (Brief, top of page 24).

The testimony as to this pay roll could have served no other purpose than to mislead and confuse the jury as to what they were to do with it. This testimony dealt with large sums which could not properly be applied by the jury to any lawful purpose under the issue in this case.

V.

The Court of Civil Appeals erred in overruling appellant's eighth assignment of error (Brief, page 64) wherein appellant assigned as error the charge of the court below permitting a recovery by appellees of penalties assessed against them for sundry delinquencies under the contract, imposed by the engineer in charge, as he was authorized by the contract to do, without alleging fraud or mistake in the settlement of these penalties as they accrued. That the facts might not make a case of estoppel from the standpoint considered by the Court of Appeals does not end the appellant's contention. A settlement—a contract of settlement—was also urged.

First Proposition.

While appellees continued to work they were electing to stand on the contract and to abide its provisions, and having incurred certain penalties under the contract, and having submitted to the ruling of the engineer in charge with reference thereto, this was a settlement, a stated account as to those items, and though appellees might if they had fully performed their contract, have sued for damages caused by appellant's failure to furnish such crusher and water and coal as the contract required, they would not have been permitted to litigate in such suit items of penalties as to which they had had a settlement with appellant without direct pleading to set aside said settlement for fraud or mutual mistake.

VI.

The Court of Civil Appeals erred in not sustaining appellant's fifteenth assignment of error complaining of error of the court below in refusing to instruct the jury that there was no evidence before them showing the amount of ballast that could have been produced by appellees under normal conditions and efficient management of the plant, either as it was or as appellees alleged it should have been, and that the jury were left without any proper measure of damages. (Brief, 87-88.)

Statement.

The plaintiff's pleading shows that in the locality where the work was being done the weather was so inclement in winter as to preclude work a great part of the winter, and to seriously interfere with work at other times; that they paid out \$690.00 per day for long periods of time for labor when it was unemployed. No effort was made by the appellees to have the court submit any issue to the jury to take this into consideration in estimating the cost of operations or in determining whether or not these conditions were to be

considered in passing on the grounds for appellees abandoning their contract. Doubtless the reason that no notice was taken of this pleading, or of these facts, in the charge, was owing to the fact that the contract took notice of possible weather conditions which would prevent operation of the plant and provided therefor. (Brief, top of page 24.) But this important obstacle to making normal profits was confessedly an existing trouble with which appellees had to reckon in estimating expenses and profits for much of the time. There was no evidence at all before the jury as to the expenses of operating even under normal conditions, much less when taking into consideration the long periods of inclement weather.

1539 The only evidence upon which appellees rest as to proof of profits, consists of conclusions given by one of appellees and the witness Campbell, as to what the profits would have been if the plant had been up to requirements and under normal conditions in that locality. (Appellees' Brief, pages 71 and 72.) No item or facts upon which these conclusions are based are given in their estimate, and it is quite clear that they leave out of consideration the fact that the plant must have been idle a great deal in winter season when the payroll must be kept up. Their figures give the amount of normal output per day with proper equipment which they estimate they could have turned out, and show that their estimates are based on turning out such amount every day in order to make the profits they estimate they could have made. There is no evidence before the jury as to what the profits would have been if these periods of inclement weather are to be taken into consideration; and they certainly must be considered for the plaintiffs allege these facts, and all they allege must be taken as established when invoked against any other contention made by them.

Of course the testimony of plaintiffs as to the extraordinary conditions growing out of weather conditions, failure of equipment, fuel and water, to come up to normal conditions, furnish no guide to a measure of damages without items of expense of normal equipment, fuel and water, such as the contract called for, so that a comparison of the expenses under the different conditions, equipments, etc., might throw light on what the profits would have been.

These considerations show that giving the appellees the benefit of all their testimony, they failed to furnish by it any measure of damage.

The same considerations again emphasize the error complained of in another part of this motion of admitting in evidence sundry items of large expense incurred confessedly under abnormal and extraordinary conditions, and which did not for that reason tend to show what plaintiff's damages were without the other side of the matter being shown as to what the expenses would have been if proper equipment and water and fuel had been furnished, to be used however subject to the weather obstacles which were enormous, according to plaintiffs' version, and for which appellant could not be held responsible, as the contract showed on its face that unsuitable weather would occur which would stop work. (Brief, top of page 24.)

Proposition.

The charge of the court below limited the jury as to the measure of damages in so far as the measure of damages might be affected by negligence of appellees in operating the plant to negligence in operating the part of the equipment which was furnished by appellants and thereby precluded the jury from permitting the negligent operation by appellees of the equipment furnished by themselves to affect the measure of damages by which they were to be guided, which charge all the more placed the case before the jury without any adequate measure of damages which the charge would allow to be considered, and which was supported by the evidence; and this required the giving of the special charge in question to the effect that the evidence under the charges given failed to furnish a measure of damages.

VII.

The Court of Civil Appeals erred in not sustaining appellant's twentieth assignment of error and proposition thereunder, complaining of the refusal of the Court below to charge the jury that if appellees knew that appellant had contracted with the Austin Manufacturing Company to furnish appellant a crusher of maximum capacity of 1000 cubic yards per day and to test it for three days, and if appellees saw those tests and expressed themselves as satisfied therewith, and if appellant acting upon the appellees' expressions accepted said crusher and delivered it to appellees, that they
1541 were estopped to deny that the crusher came up to requirements. (Brief, Pages 107-8-9.)

Statement.

See statement in brief p. 108-9. The following was the testimony on this point: The contract with the Manufacturing Company had the provision in it just recited (St. facts 780). Mr. S. C. Harrison, engineer in charge for the E. P. & S. W. Ry. Co., testified that on February 16th, 1906, after the plant and equipment provided by the manufacturers to the E. P. & S. W. Ry. Co. which the Company was to deliver to appellees, had been in operation for three days that he and Mr. Igert, representing appellees, and Mr. Wiekell, one of appellees, went over the plant. "Mr. Igert and I had been over the plant there the three days it was running and that was the only examination we made of it that I know of." (St. Facts 655).

On the same day (Feb. 16, 1906) or evening of the 15th, S. T. Wilson, appellant's Division Engineer at Douglas, Arizona, wired to Mr. S. T. Harrison, local engineer at the crusher works in New Mexico, as follows: "Redding's wire second. Impossible for me to accept crusher by seventeenth. If everything is moving to entire satisfaction of Contractors Eichel & Weikle, you may take the plant over for the Company and release Redding. (Signed) S. T. Wilson." (St. of facts, 6700671).

On the morning of the 17th, Mr. Harrison communicated the contents of the telegram to appellees' representative and to one of

them,—they had expressed themselves as satisfied with the plant (St. fets. 655). Thereupon Harrison, appellant's engineer, accepted the crusher from Mr. Redding, the latter representing the contractors who were putting in the crusher. Mr. Harrison, representing appellant testified: "I considered my acceptance of the plant from Mr. Redding absolute." (St. Fets. 655).

The Austin Manufacturing Company had contracted with appellant to put in the plant and operate it three days. (St. Fets. 780).

1542

VIII.

The Court of Civil Appeals erred in not sustaining appellant's twelfth and thirteenth Assignments of Error and propositions thereunder, complaining of the refusal of the court below to give special instructions to the effect that appellees' knowledge of the crusher precluded their claiming damages after receiving it as up to requirements of the contract. (See Brief, p. 78 to 84, inclusive, for assignments, propositions and statements.)

IX.

The Court of Civil Appeals erred in overruling appellant's twenty-fourth (Brief p. 124 to 125) and thirtieth (P. 134-5) assignments of error complaining of the refusal by the court below to give special charges on the issues raised by the evidence that appellees were not damaged by any deficiencies of the crusher furnished them by appellant if it was as deficient as they alleged because it appeared from the evidence that appellees could not have gotten out and crushed 750 cubic yards per day with the equipment and manner of work they employed.

X.

The Court of Civil Appeals erred in overruling appellant's 34th, 35th, 41st, 54th, 55th, 56th, 57th and 64th assignments of error, wherein and in each of them the appellant sought to have the trial court to try the cause according to the laws of New Mexico where the contract was made and was to be performed as to claims by appellees for damages which had not been allowed or had been disallowed by the engineer in charge, to whose judgment both parties were bound by the contract to be governed unless his decisions were bound by the contract to be governed unless his decisions were impeached by appropriate pleading of fraud, mistake or unrecoverableness and in which rulings the trial court and court of Civil Appeals erred in that it thereby refused to give full faith and credit to the
1543 public acts and laws of the Territory of New Mexico, and by such ruling in effect impaired the obligation of the contract under which appellees as well as appellant claimed in violation of the provisions of the laws and constitution of the United States requiring full faith and credit to be given in each state to the public acts of other states and territories, and forbidding the passing of any laws impairing the obligation of contracts.

Your petitioner represents that Richard F. Burges and Davis and Goggin, a firm of partners composed of Waters Davis and J. M. Goggin, are attorneys of record of appellees, and that each of them resides in El Paso, El Paso County, Texas.

Wherefore petitioner prays for a writ of error in said cause to the end that said cause may be brought before this court, and the aforesaid errors reviewed and corrected.

HAWKINS & FRANKLIN,
TURNER & BURGESS &
F. G. MORRIS,
Attorneys for Plaintiff in Error.

Post Office, El Paso, Texas.

Endorsed: App. No. 7002. El Paso & Southwestern Ry. Co., Plaintiff in Error, vs. Eichel & Weikel, Defendants in Error, Application for Writ of Error. Filed in the Court of Civil Appeals, at San Antonio, Texas, Oct. 31, 1910. Jos. Murray, Clerk. Filed in the Supreme Court of Texas Nov'r 1st, F. T. Connerly, Clerk, by J. S. Myrick, Deputy. Refused.

Certificate.

Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above and foregoing twenty-five pages contain a true and correct copy of the Application for Writ of Error and 1544 endorsements, in Application No. 7002, El Paso & Southwestern Ry. Co., Plaintiff in Error, vs. Eichel & Weikel, Defendants in Error. Which said application for writ of error was refused by the Supreme Court on the 30th day of November, 1910.

Witness my hand and the Seal of said Court, this the 25th day of February, A. D. 1911.

[SEAL.]

F. T. CONNERLY, *Clerk,*
By ———, *Deputy.*

Order Refusing Application for Writ of Error.

In Supreme Court of Texas.

EL PASO & S. W. R. R. CO.

vs.

EICHEL & WEIKEL.

From El Paso County, 4th District.

NOVEMBER 30TH, 1910.

This day came on to be heard the application of El Paso & S. W. R. R. Co. for a writ of error to the Court of Civil Appeals for the

Fourth District, and the same having been duly considered, it is ordered that said application be refused. That the applicant El Paso & Southwestern Railroad Company and its sureties Joshua S. Reynolds and J. M. Reynolds pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court, this the 6th day of January, A. D. 1911.

[SEAL.]

F. T. CONNERLY, *Clerk*,
By J. S. MYRICK, *Deputy*.

Motion for rehearing overruled Jan. 4, 1911.

(Filed in the Court of Civil Appeals at San Antonio, Texas, Jan. 7, 1911.)

1545

Motion for Rehearing.

In the Supreme Court of the State of Texas.

EL PASO SOUTHWESTERN RAILROAD COMPANY, Plaintiff in Error,
vs.

EICHEL & WEIKEL, Defendants in Error.

Now comes the plaintiff in error and moves the court to grant it a rehearing in the above styled cause, and to set aside the order refusing to grant the writ of error, as applied for, and to grant said writ of error for the following reasons, hoping to adduce some additional argument and authorities on only a few points made in the application:

First. Because this court erred in not granting the writ of error on the ground presented in assignment of error in this court No. 1 (a), based on alleged error of the Court of Appeals in overruling assignment of error directed against the peremptory charge of the court below, to the effect that the contract sued on contained a stipulation that plaintiff in error should furnish a crusher which would produce an average of 750 cubic yards of ballast per day, which stipulation was a warranty amounting to a condition precedent. This charge deals with the question solely with reference to the effect of the stipulation as to the capacity of the machine and we do not here discuss complaints as to quality of water and coal. If the charge was wrong on the construction of the contract as to the capacity of the crusher as a machine when properly supplied and run, such an error is not cured by the fact that there may have been another default as to coal and water furnished.

Argument.

1546 We failed to fully present, by argument and authorities, this assignment of error. We have great confidence that it is well taken, and beg the attention of the court, while we

present some additional argument. The verdict is large, being for \$30,000, and the court will pardon the solicitude of counsel. It seems that there should be some merit in this contention, as the Honorable Court of Civil Appeals managed to decide it both ways in the same opinion, and we are in doubt as to which one of these conclusions this Court approves in refusing the writ of error, or whether this Court acts on some independent ground. It was held by the Court of Civil Appeals on page 33 of their opinion that the stipulation as to the capacity of the crusher was "merely a collateral to the contract, and therefore was properly designated and considered by the Court as a warranty." Further on in the opinion, it was treated not as a collateral contract of warranty, but as a condition precedent to the other party being bound at all to perform the contract. The positions are diametrically in conflict. A cause of action on a warranty presupposes a performance by the party suing on the warranty. He sues on the contract. A suit for damages for failure to perform a condition precedent presupposes a refusal by the suitor to proceed under the contract because the conditions precedent to his undertaking performance was not performed. But the argument, whatever may be said as to the terms of the contract as to the maximum capacity of the crusher being 1000 cubic yards, it is certain that there is no express provision in the contract, stating that the crusher should produce an average of 750 cubic yards per day. On the contrary, it is clear from the provision in the contract for the contractor "to provide whatever additional equipment that may be found necessary to secure and maintain the average output of 750 cubic yards of ballast per working day without expense to the company" (appellant's brief page 22) that the requirement of the contract that 750 cubic yards should be produced per day, was not a stipulation which could in the nature of the case be construed to warrant the capacity of the crusher to produce that much on an average. If so, there could be no place for the undertaking which the contractor entered into to 1547 bring up the equipment to that standard, if it did not come up to that average. This shows that the contractor was to take the equipment said to have a maximum capacity of 1000 cubic yards and produce on an average 750 cubic yards per day, and if, notwithstanding, it had a maximum capacity of 1000 cubic yards, or did not have that maximum capacity, if it would not produce an average of 750 cubic yards per day, the contractor undertook to add to the equipment what was necessary to make it do so. Then, in so far as the case was made by the charge to turn, by construction, on a warranty that amounted to a condition precedent to performance by the contractor as to the average production, the charge was error.

The contract stated that the crusher was of 1000 maximum capacity, and required the contractor to develop a daily capacity of 750 cubic yards, as stated on page 20 of appellant's brief, and the stipulation on page 22, is that "the contractor agrees that he will provide whatever additional equipment that may be found necessary to secure and maintain the average daily out-put of 750 cubic yards of ballast per working day without expense to the Company." Now,

the contract must be so construed as to give some meaning to each of these provisions. A construction ought not to be adopted which renders of no effect either of these stipulations. The proper explanation of these provisions lies in the fact that the agreement to furnish a crusher of 1000 maximum capacity is not necessarily an agreement to furnish one which will, as it stands, produce upon an average 750 cubic yards per day. There is no known necessary mathematical relation between the maximum and average capacity of machinery generally, and, hence, the statement of the maximum capacity of this machine was not necessarily a guaranty of any particular average capacity. Now, it was with reference to bringing up the machinery, if required, to the average production of 750 cubic yards, that the contractor's stipulation is made. If we take the other construction and hold, as the court seems to hold, that the appellant guar-

anteed to the effect that the machine should have an average
1548 capacity of 750 cubic yards, then there was no place for any operation of the contractor's stipulation to bring the machine up to that capacity at his own expense, unless we suppose the parties to have been guilty of the absurdity of contracting that appellant should do certain things, but that if he did not, the appellee should do it at his own expense. The construction most favorable to appellee that can be given to this contract, in our opinion, is that the appellant warranted the crusher to have a maximum capacity of 1,000 cubic yards, and that the contractor agreed that he would take the plant which did have a maximum capacity of 1,000 cubic yards and from the same would either produce an average output of 750 cubic yards or would supply the equipment necessary to do so. The obligation to produce an average capacity of 750 cubic yards is the obligation of the contractor, and the words therein used are the contractor's words, not the words of the appellant.

If there is ambiguity in the contract on its face, which was explained by the parol evidence that the machine, the parties to the contract were contracting about, was on the ground at the place of work where and when the contract was made, and that it was seen and inspected by the contractor and known to the appellant who owned it and who may not have been satisfied that, as it stood, it would produce on an average of 750 cubic yards, even if it was classed as a machine of 1,000 cubic yards per day capacity, and that appellant wanted to contract that appellees should bring it up to that average production, then it was error for the court, in a jury case, to attempt to pass on the effect of this parol evidence, and to give the peremptory construction complained of, but the court should have submitted the construction of this contract as affected by parol testimony to the jury. The charge was affirmative error, which took from the jury the right to pass on the construction of the contract, in so far as its construction might be affected by the parol evidence.

- 1549 Alstin vs. Cundiff, 52 Texas, 462.
 Ginnuth vs. Blankenship, 28 S. W. 828.
 Levy vs. Tatum, 43 S. W. 941.
 Long Mfg. Co. vs. Gray, 35 S. W. 32.
 Rankin vs. Ins. Co., 189 U. S. 242.
 McNamee vs. Hunt, 87 Federal 298.

Second. Because the court erred in not granting the writ of error applied for on the fifth assignment of error in this court, page 19 of application for the writ, assailing the action of the Court of Civil Appeals in overruling appellant's eighth assignment of error, in which error was assigned on the charge of the court below in submitting as an element of damages to be recovered certain deductions from the payments otherwise earned by appellees, which deductions were imposed as penalties for delay under the contract, and were allowed in settlement between the parties from time to time during the progress of the work, with full knowledge of all the alleged deficiencies in appellant's performance of its contract.

Argument.

We have some authorities we wish to present on this point. This proposition was made briefly in the application but no authorities were cited. There was no pleading alleging mistake or fraud to authorize setting aside these settlements, amounting to stated accounts, made from time to time as the work progressed. The penalties were imposed by the engineer in charge and they were agreed to by the appellees in the periodical settlements. When parties have a dispute over items of account, and enter into a settlement thereof, such settlement may not be set aside, except upon allegations of mutual mistake or fraud, specifying the items which are erroneous.

Horan vs. Long, 11 Texas, 230.

Merriwether vs. Hardman, 51 Texas 436.

McKay vs. Overton, 65 Texas, 82.

McCamant vs. Batsell, 59 Texas, 363.

1550 The general charge authorized a recovery of all the profits its appellees would have made on the work actually done and on that unperformed, if defendant had fully complied with its contract, and in addition, specifically authorized a recovery of all penalties which had been deducted out of payments made, as penalties by agreement of the parties under rulings of the engineer, without special pleading assailing for fraud or mistake these settlements as to penalties. Now, while a recovery may have been had for damages, caused by non-performance of the contract by appellant, a matter which may not have been foreclosed by partial payments from time to time for work actually done wherein there was no account taken of damages that may have accrued to plaintiff because of *his* inability to do more work with the machinery and appliances furnished by appellant, yet there could have been no recovery for errors as to the amount due at each settlement for work actually performed without allegations to re-open these settlements. The charge of the court in thus permitting these settlements for work actually done to be set aside, because of deductions from what would otherwise have been due certain amounts for penalties for delay or for other purposes without pleading of fraud or mistake, violates the law of the case. If the inefficiency of the machinery or the poor quality of the water or coal furnished by appellants was the cause of the delays for which deductions were made, these causes

should have been urged against these periodical settlements of amounts due for the work actually done, as it progressed, and said deductions, if thus caused, should not have been allowed. But having been allowed by the parties, as shown by the acceptance of appellees of these periodical settlements of account and payments made in accordance therewith, without protest or question, they were bound by these stated accounts and settlements for work actually performed, as to quantity, quality, and whether done in due time, whatever may have been their remedy for damages for their inability to perform a greater amount of work within given time, and to earn a greater sum of money, owing to partial breaches of the contract by appellant.

Third. Because the court erred in refusing to grant the writ of error on the assignment of error No. X in this court.

This point is renewed merely to avoid waiving it. We do not offer additional argument or authorities.

Respectfully submitted.

HAWKINS & FRANKLIN,
TURNERY & BURGESS,

Att'ys for Petitioner.

Endorsed: Mo. No. 2422. In the Supreme Court of Texas. El Paso & Southwestern Railroad Company, Plaintiff in Error, vs. Eichel & Weikel, Defendants in Error. Motion for re-hearing of Plaintiff in Error's Application for Writ of Error. Filed in Supreme Court of Texas December 14, 1910. F. T. Connerly, Clerk, by J. S. Myrick, Deputy. Overruled January 4, 1911.

Certificate.

Clerk's Office, Supreme Court.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above and foregoing six pages contains a true and correct copy of the original motion for re-hearing and endorsement, now on file in this office, in App. No. 7002. (Mo. No. 2422) (El Paso & Southwestern Railroad Company, Plaintiff in Error, vs. Eichel & Weikel, Defendants in Error. I further certify that said motion for re-hearing was overruled by the Supreme Court on January 4th, 1911.

Witness my hand and the seal of said Court, this the 24th day of February, A. D. 1911.

[SEAL.]

F. T. CONNERLY, *Clerk.*

1552

Certificate.

From El Paso County, Fourth District.

App. No. 7002.

EL PASO & S. W. R. R. Co.

VS.

EICHEL & WEIKEL.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, do hereby certify that in the above styled and numbered cause, on application for writ of error, from El Paso County, Fourth District, the Supreme Court of Texas, on November 30th, 1910, without written opinion, refused and denied the application for writ of error; and that afterwards, on, to-wit, January 4th, 1911, said Supreme Court of Texas, without written opinion, overruled a motion for a rehearing on the refusal and denial of the application for writ of error.

In Testimony Whereof, Witness my Hand and the seal of the Supreme Court of Texas, at the City of Austin, This the 10th day of February, A. D. 1911.

[SEAL.]

F. T. CONNERLY,

*Clerk of the Supreme Court of Texas.**Petition for Writ of Error.*

(Filed Feb. 23, 1911.)

In the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, at San Antonio, Texas.

No. 4329.

EL PASO AND SOUTHWESTERN RAILROAD COMPANY (Defendant in Trial Court), Appellant,

VS.

EICHEL and WEIKEL (Plaintiffs in Trial Court), Appellees.

1553 *Petition for Writ of Error Presented to the Honorable J. H. James, Chief Justice of the Court of Civil Appeals of the 4th Supreme Judicial District of the State of Texas.*

Your petitioner, the El Paso and Southwestern Railroad Company, a corporation incorporated under the laws of the Territory of Arizona, defendant in the trial court, and appellant in this court, respectfully shows to the court:

That the appellees, Eichel and Weikel, instituted a suit in the District Court of the 41st Judicial District of the State of Texas for El Paso County, against your petitioner, by a petition alleging, amongst other things, in substance that appellees entered into a

certain written contract with your petitioner by which said appellees agreed, for a certain consideration therein specified and set forth in said petition, to take a certain rock crushing plant which your petitioner was then about to purchase and which was then in process of being installed by the vendors and tested, and which was located entirely in the Territory of New Mexico, and to produce and deliver to your petitioner by means of the same ballast for use by it in ballasting its road bed, your petitioner to furnish coal and water to operate said plant and the quarry, also situated in the Territory of New Mexico, from which the rock was to be procured, and that appellees accordingly did take possession of and operate said plant and quarry and produce ballast therefrom under said contract, which contract was attached to and made a part of said petition, the parts of said contract material to this application for writ of error being as follows (appellees being therein called Contractors and your petitioner Company), namely towit:

"Third. The contractor further agrees to deliver said ballast as specified in said attached specifications or that portion to the company free and discharged of all liens, claims or charges whatsoever, on or before the — day of —, nineteen hundred and — completely finished to the satisfaction of the Chief Engineer, to be evidenced by his certificate to that effect.

1554

Consideration.

Fourth. The company, in consideration of the agreements aforesaid, agrees to pay or cause to be paid to said contractor, upon presentation of certificates signed by said Chief Engineer or his authorized agent, the following rates and prices: Forty-five cents per cubic yard, modified as stated in said attached specifications; and the following prices for extra work: — in lawful money of the United States, as follows: as stated in said attached specifications.

Payment.

On or about the twentieth day of each month, the value of the work, labor and material that have been placed in the before-mentioned — during the previous month, all of which shall have been furnished by the contractor under the terms of this agreement, shall be estimated by the said Chief Engineer or his authorized agent, and ninety per cent. of this value shall be then paid, and the remaining ten per cent. when the entire said contract shall have been completed in accordance with the terms of this agreement, and the drawings and specifications made a part hereof. * * *

Disagreement.

Seventh. The decisions of the Chief Engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; and each of the parties hereto waives any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants herein, so that the de-

cision of said Chief Engineer shall, in the nature of an award, be final and conclusive on the rights and claims of said parties.

The decision of the Company's Engineer of Maintenance of Way shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; 1555 and each of the parties hereto waive any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants herein, so that the decision of said Engineer of Maintenance of Way shall, in the nature of an award, be final and conclusive on the rights and claims of said parties." * * *

It was further provided in said contract that the company should pay for said ballast on or about the twentieth of each month, in accordance with specifications of said agreement during the preceding calendar month, less ten per cent., which ten per cent. should be retained until the whole ballast required by the company under the terms of agreement, should have been delivered by the contractor, when the said ten per cent., with all other payments that might be then due and payable to the contractor from the company under said agreement, should be paid to the contractor upon the certificate of the company's Engineer of Maintenance of Way that the contractor had acceptably discharged all of his obligations under said agreement in conformity to specifications therein contained.

Appellees alleged that the plant delivered was stipulated to have a maximum capacity of 1,000 cubic yards of stone in ten hours, and an average capacity of 750, but that in fact said crusher plant did not have said maximum or average capacity, and appellees further alleged that the coal and water furnished to them by appellant under said contract was impregnated with alkali and unsuited to the purpose of operating said plant. Appellees further alleged that they performed a part of said contract, but that petitioner violated the same by failing to furnish a plant of the capacity stipulated in the contract, and by failing to furnish suitable water, and in other respects, and thereby prevented them from further performance, and damaged them financially, and they sought a recovery of such damages. Appellees, however, did not allege any compliance on their part with the provisions of the contract above quoted, or any of the same.

1556 By its answer to said petition appellant generally excepted to the sufficiency of the same, and also specifically excepted because on the face of the petition it appeared that it was agreed that appellees should be paid by appellant from month to month upon estimates made by the Chief Engineer for the work done by appellees, ninety per cent. during the succeeding month and ten per cent. should be retained until the whole of the ballast was delivered, when the said ten per cent so retained, with all other payments that might be due and payable to the appellees, should be paid upon appellees obtaining a certificate from appellant's Engineer of Maintenance of Way that appellees had acceptably discharged all of their obligations under said contract; and because said petition did not allege that the defendant's Engineer of Maintenance of Way had ever made any such certificate; and further specially excepted to said petition for the reason that it appeared upon the face thereof that the decision

of appellant's Engineer of Maintenance of Way should be final and conclusive in any dispute between the parties to the agreement relative to or touching the same, and that each of the parties had thereby waived any right of action, suit or suits, or other remedy in law or otherwise, by reason of the covenants in said contract, so that the decision of said Engineer of Maintenance of Way should in the nature of an award, be final and conclusive on the rights and claims of appellees as set up in their petition; all of which exceptions were submitted to the trial court and by the trial court erroneously overruled. Appellant also by said answer denied the allegations contained in plaintiffs' petition, and plead in substance that it was agreed between appellees and appellant in the contract sued on that the work therein to be performed by appellees should be done and finished to the satisfaction of the Chief Engineer of appellant; that the payments therein agreed to be paid by appellant should be made to said appellees upon presentation of certificate signed by
1557 said Chief Engineer, or his authorized agent; that on or about the 20th of each month the value of the work, labor, and materials done and furnished during the previous month should be estimated by said Chief Engineer, or his agent, and payments made by appellant in accordance with and under said estimates; that when the whole of the ballast required by appellant under the terms of said agreement was delivered by appellees, the ten per cent. retainage provided for by the contract, and all other amounts due thereunder, should be paid upon certificate of appellant's Engineer of Maintenance of Way to the effect that appellees had acceptably discharged all their obligations under said contract in conformity with certain specifications therein particularly set out; that the decision of appellant's Engineer of Maintenance of Way should be final and conclusive in all disputes which might arise between the parties to said agreement relative to or touching the same; and that each of the parties to such agreement waived any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants therein contained, so that the decision of the Engineer of Maintenance of Way should, in the nature of an award, be final and conclusive on the rights and claims of said parties; that said contract was made to be performed within and with reference to the laws of the Territory of New Mexico and that was the intention of the parties in making such contract; that there was in existence in the Territory of New Mexico at the time when said contract was so made a certain non statutory and unwritten law to the effect that agreements such as those especially plead as embodied in said contract are valid and binding, and that neither of the parties to such contract have any right of action in law in a cause based thereon, but must rely upon the decision of said Chief Engineer or Engineer of Maintenance of Way, and therefore appellant alleged that appellees should not be allowed to maintain their action because the said Engineer
of Maintenance of Way had not certified that the appellees
1558 had acceptably discharged all of their obligations under said contract, nor had he ever determined that there was anything due from appellant to appellees on account of any of the matters or things which said appellees complained of, and because the said ap-

pellees had never submitted to said Engineer of Maintenance of Way the matters and facts so by them complained of except as referred to in the plea next thereafter contained in said answer, and that all of the same are in dispute between appellees and appellant and arise out of, relate to, and touch the said contract, but that all of the same which have been in fact submitted to said Engineer of Maintenance of Way have been passed upon and determined by him, and that appellant has fully paid to appellees all amounts determined by said Engineer of Maintenance of Way to be due under said contract.

And by a further plea, after setting up the terms of said contract and the laws of the said Territory of New Mexico, to the effect that the agreements and provisions therein contained are binding upon the parties, in existence at the time when said contract was made above referred to, appellant plead that during each month subsequent to any month when appellees produced and delivered to the appellant ballast under the terms of said contract, the appellant's Engineer of Maintenance of Way, acting upon his own authority as provided in said contract, and also as the designated agent of appellant's Chief Engineer, estimated and determined the amount of compensation due to said appellees under said contract, and in estimating and determining the same determined the amount of penalty which appellant had a right to assess against appellees for failure to perform their contract, and the amount of damages due to appellees on account of any delays which had been occasioned to them, as provided in said contract, by the fault of appellant, and had from month to month certified thereto and appellant in each instance,

after deducting the said ten per cent. of the amount of compensation so allowed, paid the remainder thereof to said appellees, which amounts had been received by the appellees in full settlement of the amounts due them at said respective periods under said contract, and in full satisfaction of all damages and allowances on account of any delays or expenditures which might have been caused to appellees.

And while the appellant further alleged that the appellees had never fulfilled their contract aforesaid, yet in December 1907, they refused to longer perform the same or furnish any ballast to appellant thereunder, and that thereupon appellant treated said contract as having been terminated, and therefore the last estimate of said Engineer of Maintenance of Way for the month in which the last work was performed became, as far as the liability of appellant is concerned, the final certificate of such Engineer of Maintenance of Way, as contemplated by said contract, by which estimate it was determined that the appellant owed Appellees \$4,707.53, which has been paid, except only ten per cent. retainage, for which appellant claims a lien in accordance with its plea.

And appellant alleged that by said contract the question as to whether or not the plant had the capacity called for by the contract, and as to whether or not the water and coal were of the character therein required to be furnished, was committed to the decisions of the Engineer of Maintenance of Way and the Chief Engineer of appellant, and that in giving to the Engineer of Maintenance

nance of Way and Chief Engineer power to pass upon the performance of the contract the parties to the same had especially in view that such power included the right to determine whether or not the plant had the capacity called for thereby, or the water and coal furnished for use was of the character agreed to be furnished, and that the certificate of the said Engineer as to the matters so committed to his decision is necessary to enable appellees to recover; that said Engineer of Maintenance of Way did determine that said plant had a maximum capacity of 1,000 cubic yards per ten hours and an average capacity of 750 cubic yards, and determined that said coal 1560 and water was such as called for under said contract, and suitable for the uses to which the same were to be put. Appellant proved in evidence that the laws of the Territory of New Mexico were as plead by appellant, and established, or at least offered evidence tending to establish the truth of all of the other material allegations contained in said pleading.

Appellant thereupon by proper special charges requested the court to administer said laws of the Territory of New Mexico, and submit the same to the jury in its instructions and in special instructions prepared and duly requested by the appellant, but the trial court erroneously declined to give full faith and credit to said laws of the Territory of New Mexico, as plead by appellant and proved in evidence, and erroneously declined to administer said laws and to give such special instructions asked by appellant, but erroneously submitted the case entirely under the laws of the State of Texas; and the jury, under the instructions of the court, returned a verdict in favor of the appellees and against the appellant for the sum of \$31,736.80, with interest from January 1, 1908, at the rate of six per cent., and judgment was erroneously entered against appellant and in favor of appellees for the amount of said verdict by the trial court. Appellant duly made and presented to the trial court a motion for new trial, and the trial court erroneously overruled the same.

Your petitioner appealed from this judgment to the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, and executed a supersedeas bond in the sum of \$90,000.00, with Joshua S. Reynolds and John M. Reynolds as surties, and this cause was submitted to said Court of Civil Appeals and all of said errors above specified, including the error of the trial court in so declining to give full faith and credit to the laws of the Territory of

1561 New Mexico and to submit this cause under and according to said laws to the jury for its determination, amongst others, were properly preserved and assigned as error, and submitted to said Court of Civil Appeals for its determination; and said last named court did by a final judgment rendered in said cause on the 22nd day of June, A. D. 1910, erroneously overrule all of said assignments of error, and erroneously affirmed the judgment of said trial court.

Your petitioner made a motion for rehearing of said cause in said Court of Civil Appeals and the same was by said Court of Civil Appeals refused. Your petitioner thereupon applied to the Supreme

Court of the State of Texas for a writ of error directed to said Court of Civil Appeals, seeking to remove said cause into said Supreme Court for a review and correction of said errors, and said judgment of said Court of Civil Appeals and said trial court, which application was by said Supreme Court, on the 30th day of November, A. D., 1910, denied; and thereupon your petitioner filed in said Supreme Court a motion for rehearing of said application for writ of error, which motion was by said last mentioned court, on the fourth day of January 1911, erroneously refused and denied.

Your petitioner states that the judgment of said Court of Civil Appeals above referred to is a final judgment, and that it is the highest court of the State of Texas in which a decision in this case could be had, and said Court of Civil Appeals is now the custodian of the record in this case.

Your petitioner alleges that it is aggrieved by the judgment of said Court of Civil Appeals, and that in the proceedings had prior thereto in said cause and in such judgment and proceedings, errors were committed to the prejudice of your petitioner, because in said cause there was drawn in question the validity of an authority exercised under the United States, and the decision was against its validity, and because the rights, titles, privileges, and immunities arising under the constitution and laws of the United States, and guaranteed to your petitioner, were specially set up and
1562 claimed by your petitioner, and the decision of said Court of Civil Appeals in said cause was against said title, rights,

privileges, and immunities so specially set up and claimed, and a denial of the same to your petitioner, and because in particular said Court of Civil Appeals and said trial court, as well as said Supreme Court erroneously failed and refused to give to the laws of the Territory of New Mexico, so specially plead and set up in said suit by your petitioner, the full faith and credit required to be given to the same by the constitution and laws of the United States, all to the damage and prejudice of your petitioner. All of which appears more fully from a transcript of the proceedings in said suit, and the accompanying file of papers and copies of the orders of courts, all of which are on file in the Court of Civil Appeals aforesaid, and to which reference is hereby respectfully made, with the request that they be considered in connection with and as a part of this application. Your petitioner files herewith assignments of error and prays that the same be considered as a part hereof.

Wherefore your petitioner prays for an allowance of the writ of error to the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, which now has the record in said cause, and in which said final judgment was rendered, for the removal of said cause into the Supreme Court of the United States, to the end that the errors in judgment and proceedings in said suit may be corrected and that full and speedy justice may be done to the parties aforesaid in this behalf, and that the amount of bond be fixed and that the transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the

United States, and petitioner prays for citation and supersedeas. And petitioner prays that said judgments be reversed.

Dated this 12th day of January 1911.

W. A. HAWKINS,
JOHN FRANKLIN,
W. W. TURNEY,
W. H. BURGESS,
T. T. VANDER HOEVEN,
*Attorneys for Petitioner, El Paso and South-
western Railroad Company.*

Granted Feb. 23, 1911.

JOHN H. JAMES,
*Chief Justice Court of Civil Appeals for the 4th
Supreme Judicial Dist. of Texas.*

1563

Order Allowing Writ of Error.

(Filed Feb. 23, 1911.)

In the Court of Civil Appeals of the Fourth Supreme Judicial
District of the State of Texas, at San Antonio, Texas.

No. 4329.

EL PASO AND SOUTHWESTERN RAILROAD COMPANY (Defendant in
Trial Court), Appellant,

vs.

EICHEL AND WEIKEL (Plaintiffs in Trial Court), Appellees.

Order Allowing Writ of Error.

Upon motion of attorneys for appellant, plaintiff in error, the
El Paso and Southwestern Railroad Company, and upon its filing a
petition for writ of error and assignments of error, it is

Ordered that a writ of error be and hereby is allowed, in accord-
ance with the prayer in its petition, and the amount of supersedeas
bond on said writ of error is hereby fixed at Seventy-five thousand
(\$75,000.00) dollars, and on giving the same the judgment of this
court shall be suspended.

February 23, 1911.

J. H. JAMES,
*Chief Justice of the Court of Civil Ap-
peals of the Fourth Supreme Judicial
District of the State of Texas.*

Bond on Writ of Error.

(Filed Feb. 23, 1911.)

In the Court of Civil Appeals of the Fourth Supreme Judicial District
of the State of Texas, at San Antonio, Texas.

1564

No. 4329.

EL PASO AND SOUTHWESTERN RAILROAD COMPANY (Defendant in
Trial Court), Appellant,

vs.

EICHEL AND WEIKEL (Plaintiffs in Trial Court), Appellees.

Bond on Writ of Error.

Know all men by these presents that we, the El Paso and Southwestern Railroad Company, a corporation organized under the laws of the Territory of Arizona, as principal, and James G. McNary and J. J. Mundy, as sureties, are held and firmly bound unto Eichel and Weikel, a firm composed of William Eichel and Adam Weikel, in the full and just sum of seventy-five thousand (\$75,000.00) dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23rd day of February, A. D. 1911.

Whereas, on the 22nd day of June, A. D. 1910, in the Court of Civil Appeals of the Fourth Judicial District of the State of Texas at San Antonio, Texas, in a certain suit pending in said court between said El Paso and Southwestern Railroad Company, appellant, and said Eichel and Weikel, appellees, being cause No. 4329, in said court, a judgment and decision was rendered against the said El Paso and Southwestern Railroad Company affirming the judgment of the District Court of El Paso County, Texas, based upon a verdict against the said El Paso and Southwestern Railroad Company for the sum of thirty-one thousand seven hundred and thirty-six and eighty one-hundredths (\$31,736.80) dollars, with interest at the rate of six (6%) per centum per annum from January 1, 1908, and a motion for rehearing filed in said Court of Civil Appeals by
1565 said appellant was refused and an application thereafter made by said appellant to the Supreme Court of the State of Texas for a writ of error to correct said judgment was denied by the Supreme Court of the State of Texas on the 30th day of November, 1910; and

Whereas, a motion for rehearing on said application for writ of error was thereafter filed by said El Paso and Southwestern Railroad Company in the Supreme Court aforesaid, and was by said court, on the 4th day of January, A. D. 1911, overruled and denied, and said judgment of said Court of Civil Appeals thereby became final; and

Whereas, said El Paso and Southwestern Railroad Company has

prosecuted and obtained a writ of error from the Supreme Court of the United States directed to said Court of Civil Appeals to reverse the judgment and decree rendered in said case by said last named court and filed a copy thereof in the clerk's office of said Court of Civil Appeals, and a citation directed to said Eichel and Weikel, citing and admonishing them to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date thereof;

Now, therefore, the conditions of the above obligation are such that if the said El Paso and Southwestern Railroad Company shall prosecute the said writ of error from said Supreme Court of the United States to effect and answer all damages and costs, if it fails to make its plea good, then the above obligation shall be null and void, otherwise to remain in full force, virtue and effect.

EL PASO AND SOUTHWESTERN RAIL-
ROAD COMPANY,
By JNO. FRANKLIN,
Its Agent and Attorney of Record.
JAMES G. McNARY,
J. J. MUNDY,
Sureties.

Approved February 23, 1911, by

JOHN H. JAMES,

*Chief Justice of the Court of Civil Appeals for the
Fourth Supreme Judicial District of Texas.*

1566 STATE OF TEXAS,

County of El Paso, ss:

Before me, W. M. Butler, a Notary Public in and for the County of El Paso, State of Texas, on this day personally appeared John Franklin, known to me to be the person whose name is subscribed to the foregoing instrument as the agent and attorney of the El Paso and Southwestern Railroad Company, and acknowledged to me that he executed the same for and on behalf and as the attorney and agent of the said El Paso and Southwestern Railroad Company for the purposes and consideration therein expressed.

Given under my hand and seal of office this the 18th day of February, A. D. 1911.

[SEAL.]

W. M. BUTLER,

Notary Public in and for El Paso County, Texas.

STATE OF TEXAS,

County of El Paso, ss:

Before me, W. M. Butler, a Notary Public in and for the County of El Paso, State of Texas, on this day personally appeared James G. McNary and J. J. Mundy known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 18th day of February, A. D. 1911.

[SEAL

W. M. BUTLER,
Notary Public in and for El Paso County, Texas.

1567 STATE OF TEXAS,

County of El Paso, ss:

James G. McNary and J. J. Mundy, being duly sworn, on oath, each for himself, stated that he is worth the sum set opposite his name below in property situated in the County of El Paso and State of Texas, subject to execution, over and above his just debts and lawful exemptions.

\$35,000

JAMES G. McNARY.

\$40,000

J. J. MUNDY.

Sworn to and subscribed before me this the 18th day of February, A. D. 1911.

[SEAL.]

W. M. BUTLER,
Notary Public in and for El Paso County, Texas.

Certificate of Lodgment.

I, Jos. Murray, Clerk Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, do hereby certify that there was lodged with me, as such clerk, on February 23rd, 1911, in the matter of The El Paso & Southwestern Railroad Company, appellant, v. Eichel & Weikel, appellees,

1st. The original bond of which a copy is herein set forth.

2nd. Two copies of the writ of error herein set forth, one for the defendants, and one to file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office in San Antonio, Texas, this March 15 A. D. 1911.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
*Clerk Court Civil Appeals in and for Fourth
Supreme Judicial District of Texas.*

1568

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas be-

fore you, or some of you, being the highest court of law or equity of the said state, in which a decision could be had, in said suit, between the El Paso and Southwestern Railroad Company, incorporated under the laws of the Territory of Arizona, defendant and appellant, and Eichel and Weikel, a firm composed of William Eichel and Adam Weikel, plaintiffs and appellees, which judgment affirmed a judgment of the District Court of El Paso County, Texas, based on a verdict against said El Paso and Southwestern Railroad Company, and other proceedings therein, being No. 4329, in said Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, wherein was drawn in question the validity of a law of and an authority exercised under the United States, and the decision was against their validity; and therein was drawn in question the construction of a clause of the constitution and statutes of the United States, and the decision was against the right, privilege, title, and immunities specially set up and claimed under said clause of said constitution and statutes, a manifest error hath happened to the great damage of the said El Paso and Southwestern Railroad Company, as by its complaint appears.

1569 We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, the 23rd day of February, in the year of our Lord, nineteen hundred and eleven, and the 135th year of our Independence. Issued same day.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio.]

D. H. HART,
*Clerk of the Circuit Court of the United
States for the Western District of
Texas, at San Antonio.*

By A. J. CAMPBELL,
Deputy Clerk U. S. Courts.

To operate as a supersedeas on giving bond for Seventy five thousand dollars (\$75,000.00).

Allowed by

JOHN H. JAMES,

*Chief Justice of the Court of Civil
Appeals for the Fourth Su-
preme Judicial District of Texas.*

Return to Writ.

UNITED STATES OF AMERICA:

Court Civil Appeals in and for Fourth Supreme Judicial District of Texas.

In obedience to the *com* commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Civil Appeals, Fourth Supreme Judicial District of Texas, in the City of San Antonio, Texas, this 15th day of March, A. D. 1911.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,

*Clerk Court Civil Appeals, Fourth Supreme
Judicial District of Texas.*

[Endorsed:] No. 4329. El Paso and Southwestern Railroad Company vs. Eichel and Weikel. Writ of Error. Filed in the Court of Civil Appeals at San Antonio, Texas, Feb. 23, 1911. Jos. Murray, Clerk.

1570 From the Clerk's Office, Court of Civil Appeals, San Antonio.

UNITED STATES OF AMERICA, *ss.*:

To William Eichel and Adam Weikel. Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 25th day of March, A. D. one thousand nine hundred and eleven, pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, wherein the El Paso and Southwestern Railroad Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable J. H. James, Chief Justice of the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, this 23rd day of February, in the year one thousand nine hundred and eleven.

JOHN H. JAMES,

*Chief Justice of the Court of Civil Appeals
of the Fourth Supreme Judicial District
of the State of Texas.*

Attest:

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,

*Clerk of the Court of Civil Appeals of
the Fourth Supreme Judicial District
of the State of Texas.*

We, the undersigned attorneys of record for the defendants in error, William Eichel and Adam Weikel, hereby waive service of the foregoing citation.

Dated this 25th day of February, A. D. 1911.

R. F. BURGESS,
WATERS DAVIS,
J. M. GOGGIN,

Attorneys for Defendants in Error.

1571

EL PASO, TEXAS, March 25, 1911.

We, the undersigned, attorneys of record for the defendants in error, William Eichel and Adam Weikel, mentioned in the attached citation, hereby acknowledge due service of said citation for and on behalf of said defendants in error.

R. F. BURGESS,
WATERS DAVIS,
J. M. GOGGIN,

*Attorneys of Record for Defendants in Error,
William Eichel and Adam Weikel.*

[Endorsed:] (Original.) No. 4329. In Court of Civil Appeals, Fourth Supreme Judicial District of Texas, San Antonio. El Paso & S. W. R. R. Co. vs. Eichel & Weikel. Citation. Issued Febr'y 23", 1911. Jos. Murray, Clerk Court Civil Appeals, Fourth Dist. Texas. J. Murray, Clerk. Filed in the Court of Civil Appeals at San Antonio, Texas, Mar. 8, 1911. Jos. Murray, Clerk.

1572 In the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, at San Antonio, Texas.

No. 4329.

EL PASO AND SOUTHWESTERN RAILROAD COMPANY (Defendant in Trial Court), Appellant,

vs.

EICHEL AND WEIKEL (Plaintiffs in Trial Court), Appellees.

Assignments of Error.

Comes now the El Paso and Southwestern Railroad Company, defendant in the trial court, appellant in this court, and petitioner for writ of error to the Supreme Court of the United States, and says that in the record and proceedings had and taken herein and in giving and affirming the judgment herein by the District Court of El Paso County, Texas, manifest error was committed by this court in this:

First. Though the contract sued upon was made in the Territory of New Mexico and was to be wholly performed therein and, so far as it was performed, was performed in said Territory of New Mexico and was governed by the laws of said Territory, and though

said contract provided that the decision of appellant's Engineer of Maintenance of Way should be final and conclusive in any dispute which might arise between the parties thereto relative to or touching the said contract, and that each of said parties waived any right of action, suit or suits, or other remedy in law or otherwise by virtue of the covenants of said agreement and thereby contracted that the decision of such Engineer of Maintenance of Way should, in the nature of an award, be final and conclusive on the rights and claims of said parties, and though it was shown in evidence that the provisions of said contract were valid and binding under the laws of the Territory of New Mexico existing at the time when said contract was made and governed the construction of the same, yet the trial court, though requested by appellant, declined to instruct the jury in accordance with said law, as follows:

"At the request of the defendant you are instructed that the contract herein sued on provides that the decision of the Company's Engineer of Maintenance of Way shall be final and conclusive in any dispute which may arise between the parties to such agreement relative to or touching the same, and that each of the parties to such agreement waives any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants of said agreement, and agrees that the decision of the Engineer of Maintenance of Way shall, in the nature of an award, be final and conclusive on the rights and claims of said parties. You are instructed that the said contract was intended by the parties to be performed in the Territory of New Mexico, and that, in so far as it has been performed, has been performed within the Territory of New Mexico, and that under the laws of the Territory of New Mexico the agreement above referred to is a valid and binding agreement upon both parties to this suit. Now, if you believe from the evidence herein that the Engineer of Maintenance of Way of the defendant company has heretofore decided and determined that the plant was of the capacity warranted, and that the coal and the water were serviceable for the purposes for which they were intended, and that all allowances which plaintiffs would be entitled to by reason of delays on account of the lack of coal and water or the bad character of coal and water, if any such bad coal and water existed, and any such allowance therefor has been in fact allowed and made by the said Engineer of Maintenance of Way and the plaintiffs been paid therefor by the defendant, if any payments were due to the said plaintiffs hereunder by reason of such allowances and such determination upon the part of the Engineer of Maintenance of Way, then and in that event the plaintiffs would not be entitled to recover anything herein by reason of the incapacity of the plant or the character and quality of coal and water furnished on account of the decision of the Engineer of Maintenance of Way on the terms and provisions of the contract above recited; unless you further believe that, in making such decisions and awards, the Engineer of Maintenance of Way acted in fraud of the plaintiff's rights herein, or in such ignorance thereof as to amount in law to a fraud,

should you not so believe said Engineer of Maintenance of Way acted in fraud or in such gross mistake as to impute bad faith to him, then and in that event your verdict must be for the defendant as to all claims arising out of matters so adjusted by said Engineer of Maintenance of Way."

1574 and which refusal of the trial court to so instruct the jury was approved and affirmed as correct by the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas, and said Court of Civil Appeals thereby refusing to enforce said laws of the Territory of New Mexico, denied to appellant a right guaranteed to it by the constitution and laws of the United States, requiring that such full faith and credit should be given to said laws in every court within the United States, as it had by law or usage in the courts of New Mexico, and thereby there was drawn in question the validity of an authority exercised and a right, privilege, and immunity claimed by appellant under the constitution and laws of the United States, and the same was erroneously decided by said Court of Civil Appeals against such validity, right, privilege, and immunity, when it should have been decided in favor of the same.

Second. Though the contract sued on was not made in the State of Texas and was to be wholly performed, and in so far as it was performed, was performed, in the Territory of New Mexico, and governed by the laws of said Territory, and though said contract provided that the decision of appellant's Engineer of Maintenance of Way should be final and conclusive in any dispute which might arise between the parties to said contract relative to or touching the same, and each of the parties, by the terms of said contract, waived any right of action, suit or suits, or other remedy at law or otherwise, by virtue of the covenants contained in said contract, and expressly agreed that the decision of the Engineer of Maintenance of Way aforesaid should, in the nature of an award, be final and conclusive on the rights of the parties, and though it was shown in evidence that the provisions of said contract were valid and binding under the laws of the Territory of New Mexico existing when said contract was made and governed the construction of the same, yet the trial court, though requested by appellant, declined to give the following special instruction requested by appellant:

"You are hereby instructed that the contract sued on in this case provides that the decision of the Company's Engineer of Maintenance of Way shall be final and conclusive in any dispute which may arise between the parties to this said agreement, relative to or touching the same, and each of the parties to such agreement by the terms thereof waive any rights of action, suit or suits, or other remedy at law or otherwise, by virtue of the covenants contained in the said agreement, and expressly agrees that the decision of the Engineer of Maintenance of Way shall, in the nature of an award, be final and conclusive on the rights of the said parties. You are further instructed that the said agreement was to be performed

within the Territory of New Mexico, and that so much of the agreement as has been performed has been performed within the said Territory of New Mexico, and that the said agreement was valid and binding upon the parties thereto under the laws of the Territory of New Mexico. You are further instructed that under the laws of the Territory of New Mexico and the provisions of the said contract made in pursuance thereof, the matters and things in dispute in this controversy between the plaintiffs and the defendant, should have been submitted to the decision of the Company's Engineer of Maintenance of Way, and not having been so submitted and acted upon by him, no judgment herein can be rendered against the defendant arising out of matters involved in said dispute";

and the trial court gave no other charge so instructing the jury; and said refusal of the trial court to so instruct the jury was approved and affirmed as correct by said Court of Civil Appeals, and said Court of Civil Appeals thereby, in refusing to enforce said laws of the Territory of New Mexico, erroneously denied to appellant a right, privilege, and immunity guaranteed to appellant by the constitution and laws of the United States, requiring full faith and credit to be given to said statute in every court within the United States, as it had by law or usage in the courts of New Mexico, and thereby there was drawn in question the validity of the authority exercised and a right, privilege and immunity claimed by appellant under the constitution and laws of the United States, and the same was decided erroneously against appellant.

1576 Third. The undisputed evidence having shown that the appellees from month to month accepted the monthly estimates of work performed by them under the contract sued on which fixed the amount of their compensation for work done and received such compensation and receipted for the same, and continued so to do during the entire period of operation under the contract, without protest with reference to the amount or rate of such compensation, and without notifying the appellant that they ever expected to claim any additional compensation for the work done and ballast furnished, which estimates were submitted to and passed upon by appellant's Engineer of Maintenance of Way, appellant requested the trial court to charge the jury upon this phase of the case substantially as follows:

"At the request of the defendant you are instructed that, if you believe from the evidence that the plaintiffs accepted the monthly estimates of work performed by them under the contract and fixing the amount of their compensation for work done, upon the basis of the amount of the daily output, and receipted for the same, and continued so to do during the entire period of operations under the contract, without protest with reference to the amount or rate of such compensation and without notifying the defendant that they ever expected to claim any additional compensation for the work done by plaintiffs and ballast furnished to defendant, or without making to defendant or its agents any claim for damages by reason of any alleged failure of defendant to perform its contract, then and

in that event you are charged that they can not now assert a right to recover any additional compensation for the ballast so produced by them or damages for any additional cost to them of producing said ballast, payment for which was so made to and received by them at said contract price, or payment for any services rendered or ballast furnished at any other than the contract rate so received by them upon the basis of their monthly estimates, and your verdict as to all such claims for additional compensation or for damages sustained during the period covered by the monthly estimates upon which they have been paid, should be in favor of the defendant";

and the said trial court refused to give said charge and gave no other charge covering this phase of the evidence, which refusal, being properly assigned, was erroneously affirmed by the said 1577 Court of Civil Appeals, and there was thereupon drawn in question a right, privilege, and immunity guaranteed to appellant under the constitution and laws of the United States, to wit, the right to have given to the laws of the Territory of New Mexico by said courts the same full faith and credit that is accorded to such laws by law or usage in the courts of the Territory of New Mexico, under which laws the decision of the Engineer of Maintenance of Way, to whom such matters were referred, fixing said estimate, would have been conclusive and final under the facts established in evidence, and such question was erroneously decided against said right, privilege and immunity to the prejudice of appellant.

Fourth. It being shown in evidence that under the terms of the contract sued on, if the appellant breached the same as claimed by appellees, the question of what penalty should be imposed and the right to impose the same for said breaches was committed to and was to be passed upon by the Engineer of Maintenance of Way of appellant, designated in the contract, and that the same in many instances had been submitted to said engineer and in some cases allowed and in some instances refused by him, and the judgment of said Engineer being, under said contract, conclusive and final, in the absence of fraud, and there being no fraud alleged or proved, and it being further shown that the plaintiffs had accepted payment for the work done by them from time to time based upon the estimates and decisions of said Engineer in which such penalties were imposed, and it being further shown in evidence that under the laws of the Territory of New Mexico such decision of said Engineer was conclusive and final, the court erroneously instructed the jury in its general charge to them in substance as follows:

1578 "You are instructed that the defendant undertook to and did penalize plaintiffs for failure to turn out the yardage as required under said contract and retained as penalties out of the moneys due plaintiffs, if said penalties were improperly imposed, the sum of \$1503.34. Now, if you believe from a preponderance of the evidence that said plant did not have a maximum capacity

of a thousand yards of ballast per day of ten hours nor an average capacity of seven hundred and fifty cubic yards per ten hours, or believe from the evidence that the said water or coal furnished was not of a quality reasonably suitable for the purposes for which it was intended, if it was not, and further believe from the evidence that the penalties exacted and deducted, or any part of same, would not have accrued had said plant been of the capacity guaranteed by the defendant, if it was not, or had the coal or water been of a quality reasonably suitable for the purposes intended, if they were not, and that said reduction below the output of six hundred and fifty cubic yards for which the plaintiffs were penalized, was attributable to and caused by the said want of capacity, if any, in the plant, or unsuitable coal and water, if any, then and in that event you should find for the plaintiffs for such part of said penalties of \$1503.34 as were due to such failure, if any, on the part of the defendant and not to the fault of the plaintiffs;"

which instruction of the court to the jury was assigned as error and presented to the said Court of Civil Appeals, and by the same was approved and affirmed as the correct statement of the law, and the said Court of Civil Appeals thereby refused to enforce the laws of the Territory of New Mexico and denied to appellant a right guaranteed to it by the constitution and laws of the United States requiring that full faith and credit be given to said laws in every court within the United States as it had by law or usage in the courts of the Territory of New Mexico, and thereby there was drawn in question the validity of an authority exercised and a right, privilege, and immunity claimed by appellant under the constitution and laws of the United States and the same was erroneously decided by said Court of Civil Appeals against such valid right, privilege, and immunity, to the damage of appellant.

1579 Fifth. The contract having been made and to be performed in the Territory of New Mexico, was governed by its terms and not by the law of Texas, and the court being requested by the appellant to try and determine the cause according to the laws of the Territory of New Mexico governing the same, erroneously refused to so try and determine said cause under and in accordance with the laws of said territory, or to give any faith or credit to the same; but on the other hand tried and determined the cause under and in accordance with the laws of the State of Texas, and there was thereby drawn in question an authority exercised under the United States and a right, privilege, and immunity claimed by the appellant and guaranteed to it under the constitution and laws of the United States, and the said court erroneously decided said question against such authority, right, title, privilege, and immunity, and thereby erroneously denied to appellant to its prejudice a right, privilege, title, and immunity claimed by it under the constitution and laws of the United States.

Wherefore because of the errors assigned plaintiff in error prays that the judgment and decision of the said Court of Civil Appeals

for the Fourth Supreme Judicial District of Texas be set aside and reversed.

W. A. HAWKINS,
JOHN FRANKLIN,
W. W. TURNEY,
W. H. BURGESS,
T. T. VANDER HOEVEN,

*Attorneys for Plaintiff in Error El Paso
and Southwestern Railroad Company.*

[Endorsed:] No. 4329. Court of Civil Appeals, Fourth Supreme Judicial District, State of Texas, at San Antonio, Texas. El Paso and Southwestern Railroad Company vs. Eichel and Weikel. Assignments of Error. Filed in the Court of Civil Appeals at San Antonio, Texas, Feb. 23, 1911. Jos. Murray, clerk.

1580

Assignments of Error.

(Filed Feb. 23rd, 1911.)

In the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, at San Antonio, Texas.

No. 4329.

EL PASO AND SOUTHWESTERN RAILROAD COMPANY (Defendant in Trial Court), Appellant,

vs.

EICHEL AND WEIKEL (Plaintiffs in Trial Court), Appellees.

Assignments of Error.

Comes now the El Paso and Southwestern Railroad Company, defendant in the trial court, appellant in this court, and petitioner for writ of error to the Supreme Court of the United States, and says that in the record and proceedings had and taken herein and in giving and affirming the judgment herein by the District Court of El Paso County, Texas, manifest error was committed by this court in this:

First. Though the contract sued upon was made in the Territory of New Mexico and was to be wholly performed therein and, so far as it was performed, was performed in said Territory of New Mexico and was governed by the laws of said Territory, and though said contract provided that the decision of appellant's Engineer of Maintenance of Way should be final and conclusive in any dispute which might arise between the parties thereto relative to or touching the said contract, and that each of said parties waived any right of action, suit or suits, or other remedy in law or otherwise by virtue of the covenants of said agreement and thereby contracted
1581 that the decision of such Engineer of Maintenance of Way should, in the nature of an award, be final and conclusive

on the rights and claims of said parties, and though it was shown in evidence that the provisions of said contract were valid and binding under the laws of the Territory of New Mexico existing at the time when said contract was made and governed the construction of the same, yet the trial court, though requested by appellant, declined to instruct the jury in accordance with said law, as follows:

"At the request of the defendant you are instructed that the contract herein sued on provides that the decision of the Company's Engineer of Maintenance of Way shall be final and conclusive in any dispute which may arise between the parties to such agreement relative to or touching the same, and that each of the parties to such agreement waives any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants of said agreement, and agrees that the decision of the Engineer of Maintenance of Way shall, in the nature of an award, be final and conclusive on the rights and claims of said parties. You are instructed that the said contract was intended by the parties to be performed in the Territory of New Mexico, and that, in so far as it has been performed, has been performed within the Territory of New Mexico, and that under the laws of the Territory of New Mexico the agreement above referred to is a valid and binding agreement upon both parties to this suit. Now, if you believe from the evidence herein that the Engineer of Maintenance of Way of the defendant company has heretofore decided and determined that the plant was of the capacity warranted, and that the coal and the water were serviceable for the purposes for which they were intended, and that all allowances which plaintiffs would be entitled to by reason of delays on account of the lack of coal and water or the bad character of coal and water,

1582 if any such bad coal and water existed, and any such allowance therefor has been in fact allowed and made by the said

Engineer of Maintenance of Way and the plaintiffs been paid therefor by the defendant, if any payments were due to the said plaintiffs hereunder by reason of such allowances and such determination upon the part of the Engineer of Maintenance of Way, then and in that event the plaintiffs would not be entitled to recover anything herein by reason of the incapacity of the plant or the character and quality of coal and water furnished on account of the decision of the Engineer of Maintenance of Way on the terms and provisions of the contract above recited; unless you further believe that, in making such decisions and awards, the Engineer of Maintenance of Way acted in fraud of the plaintiffs' rights herein, or in such ignorance thereof as to amount in law to a fraud, should you not so believe said Engineer of Maintenance of Way acted in fraud or in such gross mistake as to impute bad faith to him, then and in that event your verdict must be for the defendant as to all claims arising out of matters so adjusted by said Engineer of Maintenance of Way."; and which refusal of the trial court to so instruct the jury was approved and affirmed as correct by the Court of Civil Appeals of the Fourth Supreme Judicial District of Texas, and said Court of Civil Appeals thereby refusing to enforce said laws of the Territory of New Mexico, denied to appellant a right

guaranteed to it by the constitution and laws of the United States, requiring that such full faith and credit should be given to said laws in every court within the United States, as it had by law or usage in the courts of New Mexico, and thereby there was drawn in question the validity of an authority exercised and a right, privilege, and immunity claimed by appellant under the constitution and laws of the United States, and the same was erroneously decided by said Court of Civil Appeals against such validity, right, privilege, and immunity, when it should have been decided in favor of the same.

Second. Though the contract sued on was not made in the State of Texas and was to be wholly performed, and in so far as
1583 it was performed, was performed, in the Territory of New Mexico, and governed by the laws of said Territory, and though said contract provided that the decision of appellant's Engineer of Maintenance of Way should be final and conclusive in any dispute which might arise between the parties to said contract relative to or touching the same, and each of the parties, by the terms of said contract, waived any right of action, suit or suits, or other remedy at law or otherwise, by virtue of the covenants contained in said contract, and expressly agreed that the decision of the Engineer of Maintenance of Way aforesaid should, in the nature of an award, be final and conclusive on the rights of the parties, and though it was shown in evidence that the provisions of said contract were valid and binding under the laws of the Territory of New Mexico existing when said contract was made and governed the construction of the same, yet the trial court, though requested by appellant, declined to give the following special instruction requested by appellant:

"You are hereby instructed that the contract sued on in this case provides that the decision of the Company's Engineer of Maintenance of Way shall be final and conclusive in any dispute which may arise between the parties to this said agreement, relative to or touching the same, and each of the parties to such agreement by the terms thereof waive any rights of action, suit or suits, or other remedy at law or otherwise, by virtue of the covenants contained in the said agreement, and expressly agrees that the decision of the Engineer of Maintenance of Way shall, in the nature of an award, be final and conclusive on the rights of the said parties. You are further instructed that the said agreement was to be performed within the Territory of New Mexico, and that so much of the agreement as has been performed has been performed within the said Territory of
1584 New Mexico, and that the said agreement was valid and binding upon the parties thereto under the laws of the Territory of New Mexico. You are further instructed that under the laws of the Territory of New Mexico and the provisions of the said contract made in pursuance thereof, the matters and things in dispute in this controversy between the plaintiffs and the defendant, should have been submitted to the decision of the Company's Engineer of Maintenance of Way, and not having been so submitted and acted upon by him, no judgment herein can be rendered against the defendant arising out of matters involved in said dispute."

and the trial court gave no other charge so instructing the jury; and said refusal of the trial court to so instruct the jury was approved and affirmed as correct by said Court of Civil Appeals, and said Court of Civil Appeals thereby, in refusing to enforce said laws of the Territory of New Mexico, erroneously denied to appellant, a right, privilege, and immunity guaranteed to appellant by the constitution and laws of the United States, requiring full faith and credit to be given to said statute in every court within the United States, as it had by law or usage in the courts of New Mexico, and thereby there was drawn in question the validity of the authority exercised and a right, privilege and immunity claimed by appellant under the constitution and laws of the United States, and the same was decided erroneously against appellant.

Third. The undisputed evidence having shown that the appellees from month to month accepted the monthly estimates of work performed by them under the contract sued on which fixed the amount of their compensation for work done and received such compensation and receipted for the same, and continued so to do during the entire period of operation under the contract, without protest with reference to the amount or rate of such compensation, and without notifying the appellant that they ever expected to claim any additional compensation for the work done and ballast furnished, 1585 which estimates were submitted to and passed upon by appellant's Engineer of Maintenance of Way, appellant requested the trial court to charge the jury upon this phase of the case substantially as follows:

"At the request of the defendant you are instructed that, if you believe from the evidence that the plaintiffs accepted the monthly estimates of work performed by them under the contract and fixing the amount of their compensation for work done, upon the basis of the amount of the daily output, and receipted for the same, and continued so to — during the entire period of operations under the contract, without protest with reference to the amount or rate of such compensation and without notifying the defendant that they ever expected to claim any additional compensation for the work done by plaintiffs and ballast furnished to defendant, or without making to defendant or its agents any claim for damages by reason of any alleged failure of defendant to perform its contract, then and in that event you are charged that they can not now assert a right to recover any additional compensation for the ballast so produced by them or damages for any additional cost to them of producing said ballast, payment for which was so made to and received by them at said contract price, or payment for any services rendered or ballast furnished at any other than the contract rate so received by them upon the basis of their monthly estimates, and your verdict as to all such claims for additional compensation or for damages sustained during the period covered by the monthly estimates upon which they have been paid, should be in favor of the defendant;"

and the said trial court refused to give said charge and gave no other charge covering this phase of the evidence, which refusal, being properly assigned, was erroneously affirmed by the said Court of

Civil Appeals, and there was thereupon drawn in question a right, privilege, and immunity guaranteed to appellant under the constitution and laws of the United States, to wit, the right to have given to the laws of the Territory of New Mexico by said courts the same full faith and credit that is accorded to such laws by law or
1586 usage in the courts of the Territory of New Mexico, under which laws the decision of the Engineer of Maintenance of Way, to whom such matters were referred, fixing said estimate, would have been conclusive and final under the facts established in evidence, and such question was erroneously decided against said right, privilege and immunity to the prejudice of appellant.

Fourth. It being shown in evidence that under the terms of the contract sued on, if the appellant breached the same as claimed by appellees, the question of what penalty should be imposed and the right to impose the same for said breaches was committed to and was to be passed upon by the Engineer of Maintenance of Way of appellant, designated in the contract, and that the same in many instances had been submitted to said engineer and in some cases allowed and in some instances refused by him, and the judgment of said Engineer being, under said contract, conclusive and final, in the absence of fraud and there being no fraud alleged or proved, and it being further shown that the plaintiffs had accepted payment for the work done by them from time to time based upon the estimates and decisions of said Engineer in which such penalties were imposed, and it being further shown in evidence that under the laws of the Territory of New Mexico such decision of said Engineer was conclusive and final, the court erroneously instructed the jury in its general charge to them in substance as follows:

"You are instructed that the defendant undertook to and did penalize plaintiffs for failure to turn out the yardage as required under said contract and retained as penalties out of the moneys due plaintiffs, if said penalties were improperly imposed, the sum of \$1503.34. Now, if you believe from a preponderance of the evidence that said plant did not have a maximum capacity of a thousand yards of ballast per day of ten hours nor an average capacity of seven hundred and fifty cubic yards per ten hours, or believe from the evidence that the said water or coal furnished was not of a
1587 quality reasonably suitable for the purposes for which it was intended, if it was not, and further believed from the evidence that the penalties exacted and deducted, or any part of same, would not have accrued had said plant been of the capacity guaranteed by the defendant, if it was not, or had the coal or water been of a quality reasonably suitable for the purposes intended, if they were not, and that said reduction below the output of six hundred and fifty cubic yards for which the plaintiffs were penalized, was attributable to and caused by the said want of capacity, if any, in the plant, or unsuitable coal and water, if any, then and in that event you should find for the plaintiffs for such part of said penalties of \$1503.34 as were due to such failure, if any, on the part of the defendant and not to the fault of the plaintiffs;"

which instruction of the court to the jury was assigned as error and presented to the said Court of Civil Appeals, and by the same was approved and affirmed as the correct statement of the law, and the said Court of Civil Appeals thereby refused to enforce the laws of the Territory of New Mexico and denied to appellant a right guaranteed to it by the constitution and laws of the United States requiring that full faith and credit be given to said laws in every court within the United States as it had by law or usage in the courts of the Territory of New Mexico, and thereby there was drawn in question the validity of an authority exercised and a right, privilege, and immunity claimed by appellant under the constitution and laws of the United States and the same was erroneously decided by said Court of Civil Appeals against such valid right, privilege, and immunity, to the damage of appellant.

Fifth. The contract having been made and to be performed in the Territory of New Mexico, was governed by its terms and not by the law of Texas, and the court being requested by the appellant to try and determine the cause according to the laws of the Territory of New Mexico governing the same, erroneously refused to so try and determine said cause under and in accordance with the 1588 laws of said territory, or to give any faith or credit to the same; but on the other hand tried and determined the cause under and in accordance with the laws of the State of Texas, and there was thereby drawn in question an authority exercised under the United States and a right, privilege, and immunity claimed by the appellant and guaranteed to it under the constitution and laws of the United States, and the said court erroneously decided said question against such authority, right, title, privilege, and immunity, and thereby erroneously denied to appellant to its prejudice a right, privilege, title, and immunity claimed by it under the constitution and laws of the United States.

Wherefore, because of the errors assigned, plaintiff in error prays that the judgment and decision of the said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, be set aside and reversed.

W. A. HAWKINS,
JOHN FRANKLIN,
W. W. TURNEY,
W. H. BURGESS,
T. T. VANDER HOEVEN,

*Attorneys for Plaintiff in Error,
El Paso and Southwestern Railroad Company.*

1589

Cost Bill.

In Court of Civil Appeals, San Antonio, Texas.

EL PASO & S. W. R. R. Co., Appellant,

vs.

EICHEL & WEIKEL, Appellees.

From El Paso County.

Names of Principals: El Paso & Southwestern Railroad Company.

Record Filed July 31, 1909; Disposed of Oct. 5, 1910.

How decided—Aff'd with remittitur; Opinion by NEILL, A. J.

Filing Briefs & other papers.....	\$1.20
Notices	2.00
Orders	1.00
Certificates with Seal.....	1.50
Taxing Cost50
Certified Copy Bill of Costs.....	1.00
Citations & Copies	2.00
Filing and Docketing Motion.....	.35
Precept	2.00
Making Certified Copy of Motion.....	65.50
Sheriff's Fees	2.00
Transcript to Supreme Court United States.....	804.00
Transcript to Supreme Court of Texas.....	1.50
Costs in Supreme Court of Texas.....	8.05

Total.....	\$892.60
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By Cash	84.40
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Total.....	\$808.20
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THE STATE OF TEXAS:

I, Joe Murray, Clerk of the Court of Civil Appeals, at San Antonio, hereby certify that the above and foregoing Bill of Costs, for the sum of Eight hundred eight & 20/100 Dollars is true and correct.

Given under my hand and seal of office this 15th day of March, A. D. 1911.

[SEAL.]

JOS. MURRAY, Clerk.

1590

Authentication of Record.

I, Jos. Murray, Clerk Court Civil Appeals in and for the Fourth Supreme Judicial District of the State of Texas, do hereby certify that the foregoing is a true, full and complete copy and transcript of the

record and of the assignment of errors, and of all the proceedings in the case of El Paso and Southwestern Railroad Company, Appellant, versus Eichel and Weikel, Appellees, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in San Antonio, Texas, this 15th day of March, A. D. 1911.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
*Clerk Court of Civil Appeals, Fourth Supreme
Judicial District of Texas.*

1591 In the Supreme Court of the United States, October Term,
1911.

No. 547.

EL PASO & SOUTHWESTERN RAILROAD COMPANY, Plaintiff in Error,
v.
EICHEL AND WEIKEL.

Stipulation for Diminution of Record.

For the purpose of abbreviating the record in the above entitled cause and expediting the hearing of same the parties thereto agree that the following portions of the record, only, be printed, to wit:

1. First amended original petition, commencing on page 1 of present record, omitting all accompanying exhibits, except No. 1, being the contract out of which the litigation arose.
2. First amended original answer, commencing at page 81 of present record.
3. First supplemental petition in reply to answer of defendant in trial court, commencing at page 139.
4. Supplemental answer of defendant in trial court, commencing at page 156 of the present record.
5. Defendant's special charges to jury, Nos. 21, 43 and 45, appearing at pages 208, 244 and 247, respectively, of the present record.
6. Charge of court to jury, including all special charges given by the court, commencing at page 161.
7. Judgment of District Court, commencing at page 255.
8. Assignment of errors in Court of Civil Appeals filed July 28, 1909, commencing at page 378 of present record.
9. Defendant's introduction in evidence at trial, of U. S. Supreme Court decisions to establish law of New Mexico, commencing at page 1375 of present record.
10. Opinion of Court of Civil Appeals, commencing at 1592 page 1380 of the present record.
11. Remit-itur by appellees, commencing at page 1442 of present record.

12. Judgment of Court of Civil Appeals, commencing at page 1443 of present record.

13. Motion for rehearing, commencing at page 1444 of present record.

14. Order overruling motion for rehearing, commencing at page 1515.

15. Petition for writ of error to Supreme Court of Texas, appearing on pages 1515 to 1552, inclusive, of present record.

16. Petition for writ of error from Supreme Court of the United States to Court of Civil Appeals of Texas, commencing at page 1552.

17. Order allowing petition and bond, appearing on pages 1563, 1564, 1565, 1566 and 1567 of present record.

18. Writ of error in U. S. Supreme Court, commencing at page 1568 of present record.

19. Citation, etc., appearing on pages 1570 and 1571.

20. Assignment of errors in U. S. Supreme Court.

21. Cost bill, page 1589.

22. Authentication of record, page 1590.

It is further stipulated and agreed that this cause shall be submitted to the Court upon motion of defendant in error to affirm with damages, or dismiss the cause, if such motion is filed, and if such a motion is filed and overruled, that the cause shall be considered and determined, upon the transcript of the record to be printed in accordance with this stipulation.

It is further agreed between the parties hereto that in the event that either of the parties shall desire to print any further portions of the record, either after a decision by the Court on motion to dismiss, or before such decision, the same may be done.

Dated this — day of October, 1911.

W. C. KEEGIN,

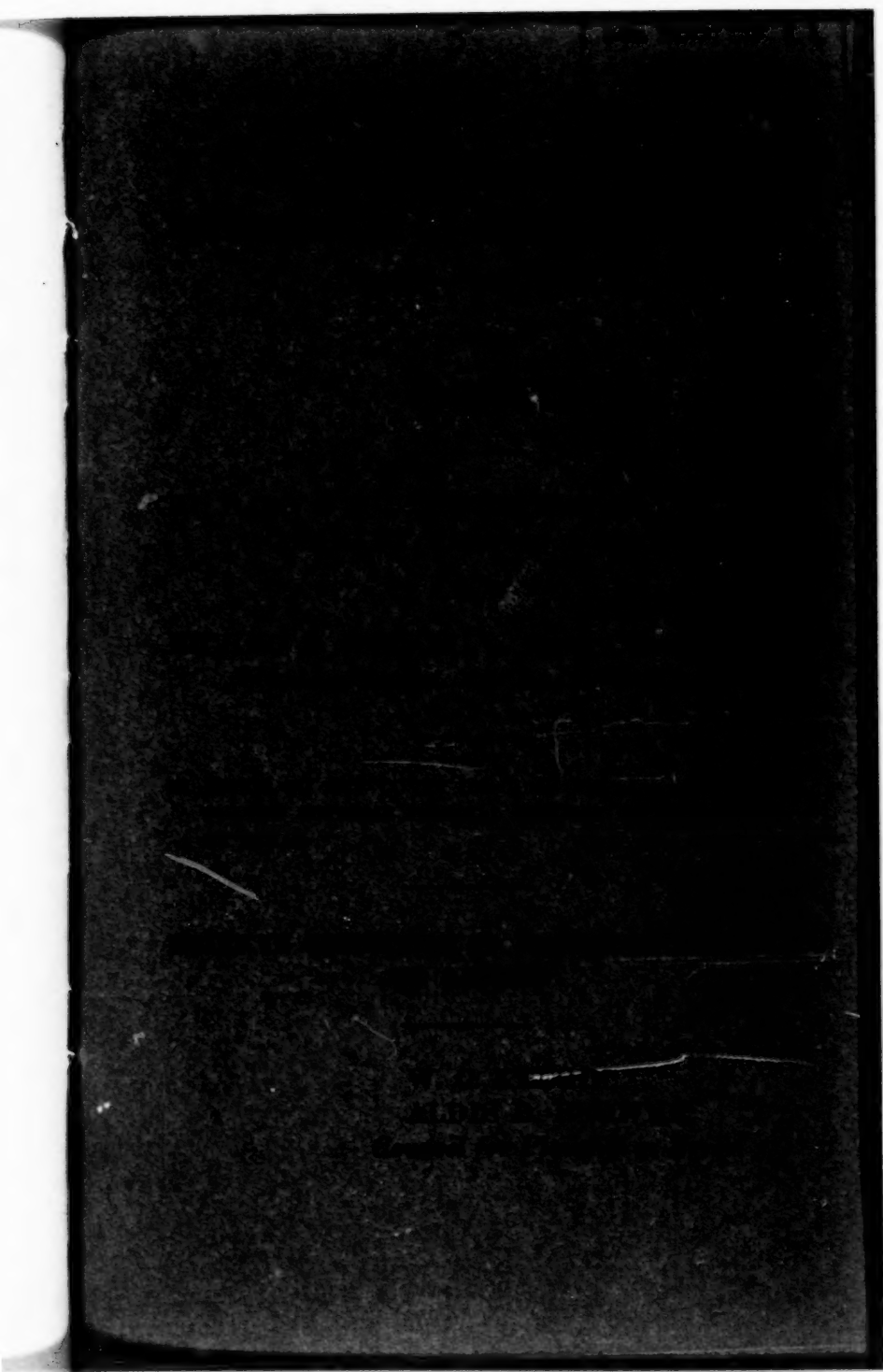
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1593 [Endorsed:] File No. 22,582. Supreme Court U. S. October Term, 1911. Term No. 547. El Paso & Southwestern Railroad Company vs. Eichel & Weikel. Stipulation as to printing record. Filed December 27, 1911.

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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1911.

No. 547.

EL PASO & SOUTHWESTERN RAILROAD
COMPANY, PLAINTIFF IN ERROR,

vs.

EICHEL & WEIKEL, A FIRM COMPOSED OF
WILLIAM EICHEL AND ADAM WEIKEL.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE
FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE
OF TEXAS.

**BRIEF IN OPPOSITION TO MOTION TO DISMISS
OR AFFIRM.**

Statement.

As no statement of facts appears upon the brief
submitted in support of the motion to dismiss, we
set forth the pertinent facts as follows:

The writ of error runs direct to the court of civil appeals because the Supreme Court of Texas denied the petition for writ of error to review the cause in that court (R., 212, 218). The action was brought by defendants in error in the district court in and for El Paso county, Texas, to recover damages for certain alleged breaches of contract committed by the railroad company.

The plaintiff in error was at the time of the occurrence of the matters complained of the owner and engaged in the operation of a railroad located in New Mexico. It desired to ballast a portion of such railroad, and to procure and crush stone into such ballast from a limestone deposit owned by it located at a certain point (Teeolote) on such railroad in such Territory. For the purpose of providing itself with such ballast from such place it entered into an agreement with the defendant in error, by which it agreed, among other things, to deliver to them, without charge therefor, a crushing and quarry plant located at the point above referred to, consisting of one complete crusher plant ready for operation, comprising one No. 7½ and one No. 5 Giratory-Austin crusher; one ballast bin, one engine, and one boiler plant, all to be erected complete at the quarry and capable of crushing one thousand cubic yards of ballast in ten hours; also two No. 3½ steam drills, one steam boiler with steam pipe and steam hose for drilling the quarry, and one small duplex pump with pipe connection for water service; also

to deliver to them at the plant all coal, water and railroad cars necessary for running the entire quarry and crusher equipment at a rate sufficient for a daily output of ballast of 750 cubic yards. The defendants in error agreed that they would with such crusher plant crush and quarry, prepare and deliver ballast to the plaintiff in error of the character agreed upon at the rate of 750 cubic yards for each day's work. The agreement provided that they were to receive at the rate of forty-five (\$0.45) cents a cubic yard for the ballast so crushed and delivered, with an understanding that this price should be increased at the rate of one cent per cubic yard for each one hundred cubic yards more than the 750 which was produced daily, and should be decreased at a like rate per cubic yard if the amount produced fell below 650 cubic yards per day.

The agreement also provided stipulated damages at the rate of fifteen (\$15.00) dollars for every ten hours delay which the plaintiff in error delayed the work by failure to deliver coal, water and cars to be furnished by it.

The agreement also contained two features under which the claim of immunity upon which the plaintiff in error relies arises and the same are therefore quoted in full. These features of this agreement are found on pages 108 and 111 of the printed record, respectively, and are as follows, viz:

“The company agrees to make the payments above specified on or about the 20th day of each month for all ballast, clearing and stripping and screening done by the contractor in accordance with the specifications of this agreement during the preceding calendar month, less 10 per cent, which percentage shall be retained by the company until the whole of the ballast required by the company, under the terms of this agreement, shall have been delivered by the contractor, when the said 10 per cent, *with all other payments that may be then due and payable to the contractor from the company under this agreement*, shall be paid to the contractor *upon a certificate of the company's engineer of maintenance of way that the contractor has acceptably discharged all of his obligations under this agreement in conformity to the following specifications.*

“The decision of the company's engineer of maintenance of way shall be final and conclusive in *any* dispute which may arise between the parties to this agreement *relative to or touching the same*; and each of the parties hereto waive any right of action, suit or suits, or other remedy in law, or otherwise, by virtue of the covenants herein, so that the decision of said engineer of maintenance of way shall, in the nature of an award, be final and conclusive on the rights and claims of said parties.”

The plaintiff in error at the time of the bringing of suit, which was previous to New Mexico becoming a State, and while it remained a Territory of

the United States, was still engaged in the operation of its road in New Mexico, but the defendants in error, instead of bringing suit in such Territory, brought the same in the district court of El Paso county, Texas, and secured service upon the Company, in answer to which it appeared and made defense by general and special exceptions in the nature of demurrers and by pleas in bar and to the merits by special exceptions Nos. 13 and 14, respectively (R., 25, 26).

The plaintiff in error referred to and pointed out that the two provisions of the contract, above quoted in full, appeared upon the face of the complaint itself, and that such complaint contained no allegation that the appellant's engineer had ever made any certificate, as provided for thereunder, and also that said petition did not show that the Company's engineer had ever decided the alleged rights and claims of defendants in error as set forth in the petition, and prayed the judgment of the court as to whether such complaints were sufficient in law to require it to answer the same.

By plea No. 19 (R., 37-39), the plaintiff in error specially set up and relied upon both of the provisions of such contract requiring a certificate of such engineer preliminary to its obligation to pay the defendants in error, and the waiver of each of the parties to all rights of suit and action, and their consent and agreement that the decision of the engineer relative to or touching all disputes under the contract should

be final and conclusive; and also set up that such contract was made with reference to the laws of the Territory of New Mexico, and to be performed in such Territory, and that such was the intent of the parties in making the same; and that there was at the time of the making of such contract, and at the time of filing such plea, a certain non-statutory and unwritten law to the effect that agreements of such character were valid and binding, and that neither of the parties to such contract and agreement had any right of action in a cause based thereon, and in the covenants and agreements therein contained, but must rely for a decision of such rights and claims on the determination of the same by such engineer, and that the defendants in error should not be allowed to maintain their cause of action, because said engineer had not certified that the plaintiffs had acceptably discharged all their obligations under said agreement, as provided therein, and because such engineer had never determined that there was anything due from the Company to them on account of the matters and things complained of, with a single exception, hereafter referred to, and that they had never submitted to such engineer for a decision of the same the matters and facts by them complained of, with such exception, and alleged that all the matters complained of were matters in dispute between the parties arising out of, relative to, and touching such contract and agreement. That a further alle-

gation (intended to cover the exception referred to) which the plaintiffs had submitted to said engineer for decision had been passed upon by him and that the Company had fully paid all amounts determined by such engineer to be due under the contract.

By its plea No. 20 (R., 39) the plaintiff in error further set up the terms of such contract and the agreements therein contained with reference to the certificate from the engineer, and the agreement to waive all suits and rights of action, and to abide by the decision of the engineer; that such agreement was made to be performed within and with reference to the laws of the Territory of New Mexico, and was at the time thereof, and at the time of making such pleas, valid and binding under the non-statutory law of such Territory, and that in pursuance thereof the company's engineer had, as a matter of fact, estimated and determined the amount of compensation due the contractors under and in accordance with such contract for the amount of ballast produced by them; and in estimating and determining the same had determined the amount of penalty which the Company had the right to assess against plaintiffs for failure to perform their contract and agreement; and it also estimated and determined the amount of damages due to said plaintiffs on account of any delays which had been occasioned to plaintiffs, as provided in said contract and agreement, and had, from month to month, certified

thereto, and that upon being furnished with such certificates the Company had in each instance, after deducting 10 per cent of the amount of compensation so allowed to plaintiffs by said engineer, paid the remainder thereof to the plaintiffs, and the same had been received by them in full settlement of the amounts due to them at such respective period of time, and in full satisfaction and payment of any and all damages or allowances on account of any delays or expenditures which had been caused to them to the date of said payments, yet that in the month of December, 1907, the contractors refused to longer perform their contract or furnish any ballast to the Company, and that thereupon the Company had treated the contract and agreement as having been terminated, and by virtue of such facts the last estimate of such engineer for the month in which the last work was performed became and was, so far as the liability of the Company was concerned, the final certificate of such engineer, as contemplated in said contract and agreement, and that thereby there was found that there was due to the contractors the sum of four thousand seven hundred and fifty-three and one-one-hundredths dollars (\$4,753.01), which amount the Company alleged it had fully paid to them, and that there now (at the time of such plea) remained due to them only the 10 per cent which had been deducted, as against which the Company claimed a set-off.

And by plea Nos. 20-A and 21 (R., 41-43) these pleas so previously made were substantially repeated, and it was therein alleged that the chief engineer of the company had in fact passed upon and determined adversely to the defendants in error each and all of the items upon which they sued, that is to say, that he had passed upon and determined the capacity of the plant, the condition in which it was turned over to them, the character of the stone to be crushed; that the water was of the character contemplated in the contract and adapted to the use to which it was put under the circumstances provided for its use; that the coal was of the character contracted to be furnished and was in fact adapted to the use to which it was to be put; that such determination of his had been based upon requests of the contractors, but all of such determinations were contrary to the contention of the defendants in error.

Notwithstanding the exceptions and the pleas in bar to the suit so filed by the Company, the court proceeded with the trial and the case was heard, and the evidence of both parties was heard before the court and jury. Amongst other evidence, there was introduced the agreement between the parties upon which the suit was based, and the Company also introduced, for the purpose of showing the law applicable to the contract in the Territory of New Mexico at the time the same was made, certain decisions of the Supreme Court of the United States, referred to on pages 98, 99 and 100 of the

printed record, and at the conclusion of the evidence, amongst other special charges, requested, by special charge No. 45 (R., 81), that the court should charge the jury that under the terms of the contract sued on the same was intended by the parties to be performed in the Territory of New Mexico, and that in so far as it had been performed it had been performed within such Territory, and that under the laws thereof the agreement therein contained that the decision of the company's engineer should be final and conclusive, and that each party thereto waived any right of action, suit or suits, or other remedy in law, or otherwise, by virtue thereof, was a valid and binding agreement upon both parties to the suit, and that under the provisions of such contract the matters and things in such controversy should have been submitted to the decision of the Company's engineer, and not having been so submitted and acted upon by him, no judgment could be rendered against the Company arising out of the matters involved in such dispute.

The Company also, by its special charge No. 43 (R., 80), requested the court to instruct the jury that such contract was intended by the parties to be performed in the Territory of New Mexico, and that in so far as it had been performed it had been performed within such Territory, and that under the laws of said Territory the same was a valid and binding agreement upon both parties, and if

they believed from the evidence that the engineer had heretofore decided that the plant was of the capacity warranted, and that the coal and the water were serviceable for the purpose for which they were intended, and that all allowances which plaintiff was entitled to by reason of delays on account of the lack of coal and water, or the bad character of coal and water, if any such bad coal and water existed, and any such allowance therefor had been in fact allowed and made by said engineer, and the plaintiffs been paid therefor by the Company, then and in that event they would not be entitled to recover by reason of the incapacity of the plant, or the character and quality of coal and water furnished on account of the decision of such engineer, unless the jury further believed that in making such decisions and award the engineer acted in fraud of the plaintiffs' right, or in such ignorance thereof as to amount in law to a fraud, or in such gross mistake as to impute bad faith.

The court refused to give either of such instructions to the jury, but charged the jury, in fact and substance, that if they found the facts alleged by the plaintiffs were true, they had a right to recover such damages as the jury might find them entitled to without referring in any way, either in its general charge or any special charge given by it, to the provisions of the agreement with reference to the necessity of their obtaining a final certificate from the Company's en-

gineer, or with reference to the decision of the company's engineer with reference to all matters in dispute being binding upon such parties, or with reference to the parties having waived all cause of action and having agreed that the engineer might determine all matters in dispute between them. And under the charge of the court the jury returned a verdict in favor of the plaintiffs for thirty-one thousand seven hundred and thirty-six dollars and eighty-one one-hundredths (\$31,736.81), with interest thereon, and judgment was rendered by the court therefor.

An appeal was had to the court of civil appeals for the fourth judicial district of Texas and the case reviewed under assignments of error filed by plaintiff in error in such court, by the 47th and 48th of which assignments (R., 90) error was alleged because the court refused to give such special instructions Nos. 43 and 44 above referred to, and because the court failed to properly charge the jury in its general charge, or in any charge given by it as to the rule of law stated in such special instructions.

The judgment of the lower court was affirmed by the court of appeals, review thereof denied in the Supreme Court (R., 212, 218), and this writ of error sued out.

Contention of Plaintiff in Error.

The plaintiff in error contends that the agreement entered into by it and the defendants in error was by its terms to be performed in, and such part of the same as was performed was performed in, the Territory of New Mexico, and that the validity of the same and the rights of the parties thereunder were governed by the laws of such Territory that at the time of the making of such agreement and of the performances thereof and up to the present time the particular provisions of such contract with reference to such engineer's certificate and with reference to a waiver of suit and an agreement that such engineer might determine all questions in dispute, and that his determination should be final, was, under the decisions of the Supreme Court of the United States, valid and binding, and that the defendants in error were not entitled, after entering into such agreement with the plaintiff in error, to bring suit under such contract and secure judgment against it for an alleged violation thereof, but that they should have submitted all matters in dispute to this plaintiff in error's engineer to pass upon, and were not entitled to recover for such damages upon suit against this plaintiff in error, except such as such engineer had decided were due to said defendants in error; that this plaintiff in error's privilege of being protected as against any such suit was a right and immunity, and that such claim

of right and immunity arises under the laws of the United States, and that it is entitled to have the decision of the court of appeals of the State of Texas reviewed by the Supreme Court of the United States, as contemplated by section 709 of the United States Revised Statutes.

If a State court declined to give effect to or misconstrued or misapplied an act of Congress applicable to a Territory, it would undoubtedly raise a Federal question. So, also, if a State court fails to give effect to or misconstrues or misapplies the unwritten law of a Territory as established by the decisions of the Supreme Court of the United States, it equally raises a like Federal question. The laws governing the people of a Territory, whether embodied in acts of Congress or found in the decision of the Federal courts, are all equally Federal in their nature and origin. Why should those which are contained in the acts of Congress be protected and those which are contained in the decisions of the judiciary department of the United States not be? Why should the court narrow the constitutional words "Constitution and laws of the United States" until they shall be synonymous with "Constitution and statutes," and cover the statutes of the United States with the protection of the Constitution, while leaving the vast bulk of the laws of the Territories, as plainly set forth in controlling judicial decisions, to be ignored and rejected by the State courts?

Will this court say that though it is sovereign in the Territories and all other places over which the United States has exclusive jurisdiction and has announced certain controlling rules of law for the government of the people thereof, and that had this controversy come directly to this court from the courts of such Territory it would have enforced such laws and protected rights claimed thereunder, yet, solely because cases find their way here through the State courts, they, in their transit through such courts, have become so transmuted that this court can not longer give them effect, but must surrender to the State courts the power to declare that what this court has repeatedly said was the law of the Territory is in fact not the law?

This case differs from a case in which a State court has undertaken to construe and apply the laws of another State, in this: that while the Federal Constitution does not give this court the power to review such decisions, yet the States, by and through the Constitution, having surrendered to the United States the authority to acquire and thereafter govern Territories wherein the laws which the United States, either through its legislative or judicial departments, provides for such government of the Territories are the supreme laws of the land and as such are under the protection of the Supreme Court of the United States.

The plaintiff in error, by its plea in bar Nos. 19 and 20 (R., 37-41), seasonably claimed im-

munity from this suit. All of the facts upon which it based such claim were duly proven in evidence, and, by motions for judgment and special instructions requested, it insisted upon such claim throughout the trial to the conclusion thereof, and finally in its application for writ of error from the Supreme Court of Texas to the court of civil appeals (R., 211), but the protection it invoked was denied by the court.

The claim was based upon the following facts, all appearing from the face of the contract itself and the undisputed evidence:

First. That the contract was made with reference to the laws of and to be performed in New Mexico, and was partly performed there, and was performed there to the extent it was performed anywhere.

Second. That it appears upon the face of the contract itself that the parties thereto agreed with each other that the defendant's engineer should decide all disputes arising under or touching such contract, and that his decision should, as an award, be final and conclusive and binding upon both parties, and that both parties waived all right to bring suit on any claim arising thereunder.

Third. That under the decisions of the Supreme Court of the United States theretofore rendered such contracts when made to be performed in such

Territory were legal and the immunity from suit therein stipulated became a part of the contract right of the parties thereto, enforceable as such and not merely a provision with reference to the remedy.

Fourth. That it appears from the face of the contract that all of the items embraced in the plaintiffs' claim for damages arose from alleged violations by the defendant of such contract and with reference to its obligations to plaintiffs thereunder, and that each and all of the same were composed of matters which the plaintiffs should have submitted to the company's engineer for settlement and with reference to which they waived all action and right of action.

Fifth. That the undisputed evidence showed as a matter of fact each and every part of the subject-matter comprising the complaints of the plaintiffs and items making up the sum of the damages claimed by them had been submitted by the plaintiffs to said engineer, who had considered and passed upon the same, in some instances making allowances therefor, which allowances had been paid by the defendant and accepted by the plaintiffs, and in other instances disallowing the same.

Sixth. That plaintiffs did not allege in their pleadings that the company's engineer, in deciding such questions and making the allowance, and decisions so made by him upon any of the questions

so submitted, acted in bad faith or committed gross error.

Seventh. We hence submit that the immunity from suit so claimed and the right to have said engineer's determination remain final is, under the decisions of the Supreme Court of the United States, one arising under the Constitution and laws of the United States, within the meaning of section 709 of the Revised Statutes, and therefore the motion to dismiss the writ of error issued herein should be overruled.

This contention is based upon the following.

ARGUMENT.

The sixth article of the Constitution of the United States declares that "the Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land," and provides that "the judges of every State are to be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding," and also declares in Article III, section 2, that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish," and that "this power shall extend to all

cases in law and equity arising under this Constitution and the laws of the United States.”

Under the Constitution the United States became the political sovereign of the Territory of New Mexico, with unlimited right to prescribe a system of laws and of government therefor. Under the Constitution and laws enacted by Congress the Supreme Court of the United States has been given final appellate jurisdiction over and does finally determine the law governing all cases appealed thereto from such Territory involving more than five thousand (\$5,000.00) dollars, regardless of the questions involved, and its decisions interpret and determine the legal principles applicable to all cases and the rights of all parties, both contractual and otherwise, arising in such Territory. Though the courts of one of the States of the United States may not be bound under the Constitution of the United States in deciding and giving legal effect to contractual rights of litigants to follow the judicial doctrine of another State in which such contract was entered into and was to be performed, but may decide for itself what such rights are in all cases not falling within the “impairment of obligation of contract” clause of the Constitution, yet, nevertheless, decisions of the Supreme Court of the United States establishing legal principles and determining the judicial doctrine applicable and the rights of parties under contracts governed by the law applicable in a Territory are thereafter binding upon courts of any

State in any suit upon a cause of action arising under the laws in force in such Territory, and that a denial of a right or an immunity claimed under such a contract which, according to the decisions of the Supreme Court of the United States in similar cases, the defendant is legally entitled to, gives a right to have the decision of the State court so denying the same reviewed by the Supreme Court of the United States.

It seems to us that this must follow as a necessary result because and from the mere fact that the States have clothed the United States with the constitutional right to acquire and to create Territories and to govern them by laws established by Congress, which has in turn clothed the Supreme Court with its power in the premises and made its decisions thereof final. Therefore the courts of the States must respect and give effect to the laws applicable in such Territories in accordance with such decisions in the same way and to the same effect that the same must be respected and enforced by the State courts in cases involving any other Federal powers or rights, and that a refusal to be bound thereby is essentially in opposition to the sovereignty of the United States and a violation of the Constitution thereof.

While the questions raised in this case have never been directly decided by this court, and no authority directly in point is therefore available, yet we think that the principles laid down in the

cases *infra* clearly support the correctness of the propositions above advanced.

Within the domain of Federal sovereignty the Federal power is supreme. Within the boundaries of the several States a dual system obtains—Federal and State—and the delimitation of the power of the former marks the boundary line of the latter. But within the Territories this dual control does not exist—it has not yet begun. There the single sovereign, the National Government, stands supreme. By organic acts Territories may be and are created with local powers measured by the delegation thereof from the National Government and subject always to its control. Rules of decision upon matters of general law announced by the Supreme Court become the supreme law of the land within the Federal Territories. Law is not alone the expression of the legislative will, nor the judicial interpretation of the written statute. Rules of human conduct applicable to countless phases and conditions in life have their foundation in the common law, and the application of such rules to the instant case by the judicial tribunal whose utterance controls within the Territory subject to its jurisdiction becomes the controlling guide by which all related cases must be determined. Our adversaries concede that this was a New Mexico contract and to be performed wholly within that Territory. Thus conditioned, the rules of law announced by this court became in New Mexico the law of that Territory in the

interpretation of the contract. Hence we say that the law of the case as announced by the highest court of the United States determined the applicable and controlling rule of decision in whatever court—Federal or State—the meaning and legal effect of the terms employed in such contract may come under judicial review. By the law thus expounded and thus applied the parties to the contract were bound. It was the law of the land as to them and in respect of this contract when the contract was made, and under the settled rule that law became part thereof and must be interpreted thereby.

Under Article IV of the Constitution the full faith and credit which shall be given in each State to the "judicial proceedings" of every other State is held to mean that the judgment or decree of one State must when plead in another be given the same effect which by law, usage, or the decisions of the State wherein it was rendered, is accorded it in such latter State. Resort is hence often had to judicial decisions and even the oral testimony of learned lawyers to prove the measure of such effect. It can have no greater and no *less* effect. So here when the law of New Mexico is proven by decisions of this court, which *make* the rule of law and consequent rule of decision in the Federal Territory of New Mexico, that law as thus established is as truly within the meaning of the Federal Constitution as if it were proven by the statute law of New Mexico. The right of exclusive

control within the Territories conceded by the States to the National Government must in reason extend to *all* matters—contractual or otherwise—arising within such Territory. Over such power there is no restraint or limitation in favor of the States. Speaking of the Territories, Chief Justice Marshall, in *American Ins. Co. vs. Canter*, 1 Pet., 511, 546, aptly said:

“In legislating for them, Congress exercises the combined powers of the general and of a State government.”

Again:

“There is but one system of government, or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction.”

Benner vs. Porter, 9 How., 235, 242.

“The decisions of the courts of the United States within their sphere of action are as conclusive as the laws of Congress made in pursuance of the Constitution. This is essential to the peace of the nation, and to the vigor and efficiency of the Government.”

The Mayor vs. Cooper, 6 Wall., 246, 253.

II.

**The Contract Here Involved Must Be Interpreted
by the Law of the Place of Performance.**

Admittedly the contract was to be performed in New Mexico. Its terms so necessarily provided:

“Nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance. That law, consequently, must determine the rights of the parties. *Coghlan vs. South Carolina Railroad Co.*, ante, 101, and the authorities there cited.”

Hall vs. Cordell, 142 U. S., 116, 120.

In *Coghlan vs. South Carolina Railroad*, 142 U. S., 101, 109, 110, it was held:

“We have seen that the bonds in suit were redeemable on the first day of January, 1866, and not before without the consent of the holder, and were payable in pounds sterling with interest at the rate of 5 per centum per annum from date, the interest to be paid semi-annually on named days, ‘on presenting the proper coupons for the same at the house of Palmers, Mackillop, Dent & Co., London, where the principal will also be redeemed on the surrender of this certificate.’ The contract, therefore, was one which in all its parts was to be performed in England. Nevertheless it is contended that the principal sum agreed to be paid should bear interest at the rate,

7 per cent, fixed by the laws of South Carolina. The only basis for this contention is the mere fact that the bonds purport to have been made in that State. But that fact is not conclusive. All the terms of the contract must be examined, in connection with the attendant circumstances, to ascertain what law was in the view of the parties when the contract was executed. For, as said by Chief Justice Marshall in *Wayman vs. Southard*, 10 Wheat., 1, 48, it is a principle, universally recognized, that 'in every forum a contract is governed by the law with a view to which it was made.' And by Lord Mansfield, in *Robinson vs. Bland*, 2 Burrow, 1077, 1078: 'The parties had a view to the law of England. The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed. Now here the payment is to be in England; it is an English security, and so intended by the parties.' Referring to these and many other cases, this court, speaking by Mr. Justice Matthews, held, upon full consideration, in *Pritchard vs. Norton*, 106 U. S., 124, 136, that the law upon which the nature, interpretation and validity of a contract depended was that which the parties, either expressly or presumptively, incorporated into it as constituting its obligation. This doctrine was reaffirmed in *Liverpool, &c., Steam Co. vs. Phœnix Ins. Co.*, 129 U. S., 397, 458, where it was said that, according to the great preponderance, if not the uniform concurrence of authority, the general rule was 'that the nature, the obligation and the interpreta-

tion of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view.' The elaborate and careful review of the adjudged cases, American and English, in the two cases last cited, leaves nothing to be said upon the general subject.

"What law, then, did the parties have in view as determining the legal consequences resulting from the non-performance of the contract between them? Presumptively, the law of England, where the contract was to be entirely performed. The bonds and coupons were to be presented and paid there, and not elsewhere. They were to be paid in pounds sterling at a designated house in London. The fair inference is that the railroad company negotiated the bonds abroad, and made them payable in that city, in order to facilitate a sale of them to foreign buyers. Every circumstance connected with the contract tends to show that the parties intended that all questions in respect to performance or the legal consequences of a failure to perform were to be determined by the law of the place, and the only place where the obligation to make payment could be discharged, and where the breach of that obligation would occur, if payment was not made at the appointed time and place. In this view of the contract, the rate of interest, after the maturity of the obligations, was not determinable by the law of South Carolina. This is abundantly established by the authorities."

III.

The Federal Question Was Seasonably and Properly Raised.

1. By the pleadings (answer, pars. 19 and 20, R., 38-41) it was specifically averred:

"that said contract and agreement was made and to be performed within and with reference to the laws of the Territory of New Mexico and such was the intention of the parties in making such contract; and there was in the Territory of New Mexico at the time when the same was so made, has been since then, and now is a certain non-statutory and unwritten law, to the effect that agreements, such as those herein specially referred to as being embodied in said contract and agreement between said plaintiffs and defendant, are valid and binding, and that neither of the parties to such contract and agreement have any right of action in a cause based thereon, and in the covenants and agreements therein contained, but must rely for a decision of such rights and claims on the determination thereof by said chief engineer or engineer of maintenance of way, and that said contract was, under the laws of the Territory of New Mexico, valid and enforceable, and this defendant alleges that said plaintiffs should not be allowed to maintain their cause of action, because the said engineer of maintenance of way has not certified that the said plaintiffs have acceptably discharged all of their obligations under said agreement, as

with two No. 3½ steam drills, one steam boiler with steam pipe and steam hose for drilling the quarry, and one small Duplex pump with pipe connections for water supply, the undisputed evidence showing that the defendant did not make any such guarantee, nor agree under said written contract that the said crushing plant would have any particular capacity, and, in all events there was no
380 agreement on the part of the defendant that the said crushing plant would have an average capacity of 750 cubic yards in ten hours, broken to the sizes that would pass through a three inch ring.

Third. The trial court erred in instructing the jury, that under the contract sued on, the defendant agreed to erect and furnish to the plaintiffs a crushing plant at Tecolote, New Mexico, with a maximum capacity of 1,000 cubic yards of ballast in ten hours, together with suitable coal and water necessary to operate the same, and with certain other equipment in said contract specifically set out, and that the defendant agreed to furnish free transportation over its own lines of all supplies and material necessary for the operation of the plant, or for goods, wares and merchandise to be used in connection with the operation of the same, for the reason that there was no evidence that the defendant ever agreed to erect a plant of any given capacity, and, for the further reason, that there was no legal agreement on the part of the defendant to furnish such free transportation, the entire contract between the plaintiffs and the defendant which is sued on being in writing and not containing any agreement on the part of the defendant to furnish any such free transportation.

Fourth. The trial court erred in instructing the jury that they could find against the defendant the difference between the reasonable actual cost to the plaintiffs of all ballast actually produced, except that produced from October 1st to November 7th, 1906, inclusive, and what they believe from the evidence it would have reasonably cost them to produce the same, had the said plant had a maximum capacity at said quarry of 1,000 cubic yards in ten hours, and had the coal and water furnished by the defendant been of a quality reasonably sufficient and suitable for the production of steam for the operation of said plant, for the reason that the plaintiffs have been paid under said contract at the rate therein provided for the ballast actually produced, and have received said pay-
381 ments from time to time, and so are estopped from claiming any further amounts, and, for the further reason, that said plaintiffs, having alleged and proven that they abandoned and threw up said contract, could not recover for such additional costs, and for the further reason, that in that portion of said charge the court committed affirmative error in not instructing the jury that they could only find for such damages against the defendant in event the plaintiffs had used reasonable diligence in minimizing the damages, if any, and loss, if any, suffered by the plaintiffs, and that part of said charge is contradictory of and irreconcilable with the other portions of the charge in which the court instructs the jury that it was the duty of the plaintiffs to minimize the damages, if any.

Fifth. The trial court erred in the fifth paragraph of its charge to the jury in instructing them that in this case they could find for the plaintiffs damages against the defendant amounting to what the jury believed the plaintiffs would have reasonably made on the yardage of ballast not produced by them, for the reason that the plaintiffs, having abandoned said contract, could not recover such profits, and, for the further reason, that there was no evidence before the jury that showed or tended to show that the plaintiffs could or would have made any such profits.

Sixth. The trial court erred in its general charge to the jury in instructing them that the duty upon the plaintiffs to minimize the damages that would occur only arose in the event the crushing plant was not of a 1,000 cubic yard capacity per ten hour day, and that it reasonably became apparent to plaintiffs that it was not of such capacity, and that such failure, if any, would continue, because it was the duty of the plaintiffs in any event to minimize the damages, and, at least, it was the duty of the plaintiffs to have minimized the damages in event the coal and water furnished were not of suitable quality and it became apparent to plaintiffs that suitable coal and water would not be furnished.

382 Seventh. The trial court erred in its general charge to the jury in advising the jury that, in event the plaintiffs ought to have closed down the plant so as to have minimized the damages, they could only recover such damages as would proximately have accrued to them in addition to the damages which had already accrued to them, if any, had they closed down the plant at such time, not exceeding fifteen cents per cubic yard, because such charge did not correctly advise the jury as to the measure of damages, and the same was a comment upon the weight of the evidence and a suggestion to the jury that they could allow profits at the rate of fifteen cents per cubic yard, and because there is no evidence that the plaintiffs would have made any profits whatsoever, and particularly no evidence that they would have made fifteen cents per cubic yard.

Eighth. The trial court erred in the seventh paragraph of its charge to the jury in instructing them that, if they believed that the penalties imposed by the defendant on the plaintiffs under the terms of the said contract were improperly imposed, and that, if they believed that the defendant had breached its contract in the manner set forth in said paragraph, they would find for the plaintiffs for such part of said penalties as they believed was due to such failure, for the reason that the evidence shows conclusively that the question of penalties and the right to impose the same had been passed upon by the Engineer of Maintenance of Way, designated in the contract with power to impose and deduct the same, and in some instances the same had been allowed and in some instances refused, and the judgment of the said Engineer was conclusive and final in the absence of fraud, and there was no fraud alleged or proven, and, for the further reason, that the plaintiffs had accepted payment for the work done by them under the contract from time to time

based upon the estimates of the said Engineer in which said penalties were imposed.

383 Ninth. The trial court erred in the eighth paragraph of its general charge to the jury in instructing the jury that the plaintiffs could recover for freight charges made against the plaintiffs by the defendant for goods, wares and merchandise transported over the defendant's lines, for the reason that the contract between the defendant and the plaintiffs was reduced to writing and there was no agreement therein contained to the effect that the defendant would transport any such goods, wares and merchandise free of cost.

Eleventh. The trial court erred in refusing to give Special Instruction No. 1 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Twelfth. The trial court erred in refusing to give Special Instruction No. 2 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Thirteenth. The trial court erred in refusing to give Special Instruction No. 5 asked by the defendant for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

384 Fourteenth. The trial court erred in refusing to give Special Instruction No. 4 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Fifteenth. The trial court erred in refusing to give Special Instruction No. 5 asked by the defendant for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Sixteenth. The trial court erred in refusing to give Special Instruction No. 7 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Seventeenth. The trial court erred in refusing to give Special Instruction No. 8 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered

by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Eighteenth. The trial court erred in refusing to give Special Instruction No. 11 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Nineteenth. The trial court erred in refusing to give
385 Special Instruction No. 10 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Twentieth. The trial court erred in refusing to give Special Instruction No. 11 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Twentieth-first. The trial court erred in refusing to give Special Instruction No. 12 asked by the defendant for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Twenty-second. The trial court erred in refusing to give Special Instruction No. 13 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Twenty-third. The court erred in refusing to give Special Instruction No. 14 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge
the jury in its general charge to the jury, or in any charge
386 given by it, as to the rule of law stated in said Special Instruction.

Twenty-fourth. That the trial court erred in refusing to give Special Instruction No. 15 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Twenty-fifth. The trial court erred in refusing to give Special Instruction No. 16 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly

charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Twenty-sixth. The trial court erred in refusing to give Special Instruction No. 17 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Twenty-seventh. The trial court erred in refusing to give Special Instruction No. 18 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Twenty-eighth. The trial court erred in refusing to give Special Instruction No. 19 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Twenty-ninth. The trial court erred in refusing to give Special Instruction No. 20 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Thirtieth. The trial court erred in refusing to give Special Instruction No. 21 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Thirty-first. The trial court erred in refusing to give Special Instruction No. 22 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Thirty-second. The trial court erred in refusing to give Special Instruction No. 24 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

388 Thirty-third. The trial court erred in refusing to give Special Instruction No. 25 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction and the court failed to properly charge the jury in its general charge to the jury, or in

any charge given by it, as to the rule of law stated in said Special Instruction.

Thirty-fourth. The trial court erred in refusing to give Special Instruction No. 27 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Thirty-fifth. The trial court erred in refusing to give Special Instruction No. 28 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it as to the rule of law stated in said Special Instruction.

Thirty-sixth. The trial court erred in refusing to give Special Instruction No. 29 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Thirty-seventh. The trial court erred in refusing to give Special Instruction No. 31 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said special Instruction.

Thirty-eighth. The trial court erred in refusing to give Special Instruction No. 32 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Thirty-ninth. The trial court erred in refusing to give Special Instruction No. 33 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Fortieth. The trial court erred in refusing to give Special Instruction No. 34 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Forty-first. The trial court erred in refusing to give Special Instruction No. 35 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the Court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Forty-second. The trial court erred in refusing to give Special

Instruction No. 36 asked by the defendant, for the reason
390 that the same properly stated the law applicable to that phase
of the case covered by said Special Instruction, and the court
failed to properly charge the jury in its general charge to the jury,
or in any charge given by it, as to the rule of law stated in said
Special Instruction.

Forty-third. The trial court erred in refusing to give Special In-
struction No. 37 asked by the defendant, for the reason that the
same properly stated the law applicable to that phase of the case
covered by said Special Instruction, and the court failed to properly
charge the jury in its general charge to the jury, or in any charge
given by it, as to the rule of law stated in said Special Instruction.

Forty-fourth. The trial court erred in refusing to give Special
Instruction No. 39 asked by the defendant, for the reason that the
same properly stated the law applicable to that phase of the case
covered by said Special Instruction, and the court failed to properly
charge the jury in its general charge to the jury, or in any charge
given by it, as to the rule of law stated in said Special Instruction.

Forty-fifth. The trial court erred in refusing to give Special In-
struction No. 41 asked by the defendant, for the reason that the
same properly stated the law applicable to that phase of the case
covered by said Special Instruction, and the court failed to properly
charge the jury in its general charge to the jury, or in any charge
given by it, as to the rule of law stated in said Special Instruction.

Forty-sixth. The trial court erred in refusing to give Special In-
struction No. 42 asked by the defendant, for the reason that the
same properly stated the law applicable to that phase of the case
covered by said Special Instruction, and the court failed to properly
charge the jury in its general charge to the jury, or in any charge
given by it, as to the rule of law stated in said Special In-
struction.

391 Forty-seventh. The trial court erred in refusing to give
Special Instruction No. 43, asked by the defendant, for the reason
that the same properly stated the law applicable to that phase of the
case covered by said Special Instruction, and the court failed to
properly charge the jury in its general charge to the jury, or in any
charge given by it, as to the rule of law stated in said Special In-
struction.

Forty-eighth. The trial court erred in refusing to give Special
Instruction No. 44 asked by the defendant, for the reason that the
same properly stated the law applicable to that phase of the case
covered by said Special Instruction, and the court failed to properly
charge the jury in its general charge to the jury, or in any charge
given by it, as to the rule of law stated in said Special Instruction.

Forty-ninth. The trial court erred in refusing to give Special In-
struction No. 45 asked by the defendant for the reason that the
same properly stated the law applicable to that phase of the case
covered by said Special Instruction, and the court failed to properly
charge the jury in its general charge to the jury, or in any charge
given by it, as to the rule of law stated in said Special Instruction.

Fiftieth. The trial court erred in refusing to give Special Instruc-
tion No. 46 asked by the defendant, for the reason that the same
properly stated the law applicable to that phase of the case covered

by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

Fifty-first. The trial court erred in refusing to give Special Instruction No. 47 asked by the defendant, for the reason that the same properly stated the law applicable to—

392 Fifty-fifth. The trial court erred in permitting the plaintiffs to introduce, over the objections of the defendant, the purported estimates of the cost of the production of the ballast claimed by plaintiffs to have been made by defendant's Engineer of Maintenance of Way Campbell, for the reason that it only purported to be estimates of said Campbell as to the probably cost of production, and it was not shown to have been a true and correct estimate, and was immaterial and irrelevant to any issue in this case, and was hearsay as to the plaintiffs, as all of same appears in defendant's Bill of Exceptions No. 3 filed herein.

Fifty-sixth. The trial court erred in declining to permit the witness Campbell to testify to conversations and facts leading up to and inducing the entering into of the supplemental contract of December 13th, 1906, by the terms of which the contract existing between the plaintiff and defendant providing for the doing of the work at Tecolote was in some respects altered on the objections of the plaintiff- that such testimony would be immaterial and irrelevant and would tend to vary the terms of said written contract which the plaintiff- contended was unambiguous on its face, as all of which appears from defendant's Bill of Exceptions No. 34 filed herein.

Fifty-seventh. The trial court erred in permitting Wm. Eichel, one of the plaintiffs herein, to testify that the amount of the pay rolls covering the work done under the contract sued on was \$96,000, for the following reasons, to-wit:

(1) The cost of the production of the ballast was immaterial and irrelevant to any issue in this case.

(2) The plaintiff, Wm. Eichel, had testified that he had no—

393 Fifty-fifth. The trial court erred in permitting the plaintiffs to introduce, over the objections of the defendant, the purported estimates of the cost of the production of the ballast claimed by plaintiffs to have been made by the defendant's Engineer of Maintenance of Way Campbell, for the reason that it only purported to be estimates of said Campbell as to the probable cost of production, and it was not shown to have been a true and correct estimate, and was immaterial and irrelevant to any issue in this case, and was hearsay as to the plaintiffs, as all of same appears in defendant's Bill of Exceptions No. 3 filed herein.

Fifty-sixth. The trial court erred in permitting the plaintiffs to prove by William Eichel one of the plaintiffs, representations alleged to have been made by conversations with the defendant's Engineer of Maintenance of Way, J. L. Campbell, prior to the entering into of the contract herein sued on, as to climatic conditions existing at Tecolote, the capacity of the plant to be used at Tecolote,

and the character of stone to be crushed at Tecolote, for the reason that the same were made prior to the execution of the written contract herein sued on, and were not made parts thereof, and were not admissible for the purpose of contradicting, varying, or explaining said written contract or any part thereof, and were immaterial and irrelevant to any issue in this case, as all of which appears from defendant's Bill of Exceptions No. 34 filed herein.

Fifty-seventh. The trial court erred in permitting Wm. Eichel, one of the plaintiffs herein, to testify that the amount of the pay rolls covering the work done under the contract sued on was \$96,000.00, for the following reasons, to-wit:

(1) The cost of the production of the ballast was immaterial and irrelevant to any issue in this case.

(2) The plaintiff Wm. Eichel had testified that he had no
394 knowledge as to the actual amount of the pay rolls except from his examination of the same, and that, while he paid the amounts due with his checks, he could not remember the amounts paid except from the pay rolls, and that he did not make the pay rolls and had no knowledge of the verity thereof, and knew nothing of his own knowledge as to the amounts of the pay rolls and the items covered by them except as shown by the pay rolls, and the verity of which pay rolls was not testified to by any other witness, and, for the further reason, that said testimony was hearsay, all of which appears in Defendant's Bill of Exception No. 5 filed herein.

Fifty-eighth. The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs, over the objections of the defendant, that plaintiffs paid out for explosives the sum of \$18,900, for the reason that the amounts expended by plaintiffs in the purchase of explosives was immaterial and irrelevant to any issue in the case, and, for the further reason, that the said Wm. Eichel showed by his testimony that he had no personal knowledge or recollection of the payment of such bills, but had to rely upon the books, accounts and invoices in his possession, which books, accounts and invoices were not made by him, and, for the further reason, that said testimony was hearsay, all of which appears in defendant's Bill of Exceptions No. 6 filed herein.

Fifty-ninth. The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs, over the objections of the defendant, that the plaintiffs had paid out for lubricating oils used in the operation of such plant in the performance of the work under said contract, the sum of \$1,300, for the reason that the same was immaterial and irrelevant to any issue in this case, and, for the further reason, that the evidence showed that the said Wm. Eichel had no personal knowledge of the payment of such amounts, but
395 relied upon the books, accounts and invoices in his possession, which books, accounts and invoices were not made by him and as to the verity of which no proof was offered, and for the further reason, that the said testimony was hearsay, as all of which appears in defendant's Bill of Exceptions No. 7 filed herein.

Sixtieth. The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs herein over the objections of the defendant, that plaintiffs had expended for food for stock in the

performance of the work under the contract sued on the sum of \$1500, for the reason that the same was immaterial and irrelevant to any issue in the case and for the further reason that the evidence showed that the said Wm. Eichel had no personal knowledge of the payment of this sum but relied upon books, accounts and invoices in his possession, which books, accounts and invoices were not made by him and the verity of which was not proven, and for the further reason that said testimony was hearsay, all of which appears in defendant's Bill of Exceptions No. 8 filed herein.

Sixty-first. The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs, that plaintiffs had paid for bonds insuring the performance of the work under the contract sued on and the protection of the property used in the performance of the work under the contract the sum of \$10,000, for the reason that the same was immaterial and irrelevant to any issue in the case, and, for the further reason, that the evidence showed that the said Wm. Eichel had no personal knowledge as to such payments but relied upon the books and accounts in his possession, which books and accounts were not made by him and the verity of which was not proven, and for the further reason that said testimony was hearsay, all of which appears in defendant's Bill of Exceptions No. 9 filed herein.

Sixty-second. The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs, over the objections of the defendant, that the plaintiffs had paid out for railroad fare and for hire of car to bring the men to do the work under the contract sued on from Milltown, Indiana, to Tecolote, New Mexico, the sum of \$900.00 for the reason that the same was immaterial and irrelevant to any issue in the case, and for the further reason that the evidence showed that the said Wm. Eichel had no personal knowledge as to such payment, but relied upon the books and accounts in his possession, which books and accounts were not made by him and the verity of which was not proven, and for the further reason that said testimony was hearsay, all of which appears in defendant's Bill of Exception No. 10 filed herein.

Sixty-third. The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs over the objections of the defendant, that the ordinary and reasonable allowance for the depreciation of the value of the plant during the time engaged in the work covered by this contract was \$6650.00, for the reason that the same was immaterial and irrelevant to any issue in the case, and this defendant was in no wise responsible for the wear and tear and depreciation in value of the property used in the contract, and the evidence of the said Wm. Eichel showed that the same was not based upon his own knowledge and was a mere guess or surmise as to the reasonable value.

Sixty-fourth. The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs, the cost of certain tents and houses used for housing the plaintiffs' employes during the performance of the work under the contract alleged by the said

Eichel to have been \$2500.00 for the reason that the same was immaterial and irrelevant, to any issue in this case, and for the further reason that the evidence showed that this sum was simply the first cost of said houses and tents and no showing was made as to the disposition thereof by the plaintiffs when they ceased operation under the contract, all of which appears in Defendant's Bill of

Exceptions No. 11 filed herein.

397 Sixty-fifth. The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs herein, the cost of production of the said ballast, for the reason that the same was immaterial and irrelevant to any issue in this case, and, for the further reason, that *he* evidence of the said Wm Eichel showed that he had no personal knowledge of the cost of the production of the said ballast under the conditions existing at Tecolote, taking into consideration the character of the stone, the character of the coal and water, the climatic conditions under which it was produced, the character and quantity of labor available, and the distance from markets of all kinds, and, for the further reason, that the said Wm. Eichel showed that he had no familiarity whatever with the cost of production of such ballast under ideal conditions, or any other conditions other than those at Tecolote, either as to climatic conditions, the character of the stone, the character and quantity of labor available and the distance from the markets.

Sixty-sixth. The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs herein, over the objections of the defendant, that he estimated the amount that he had paid out in the way of interest on the plant and interest on the amount required to carry on the contract to be \$5,000.00, for the reason that the same was immaterial and irrelevant to any issue in this case, and, for the further reason that the plaintiffs had already been permitted to introduce testimony as to the amount of depreciation of the plant, and, for the further reason, that the testimony of the said Eichel showed that this was a mere guess on his part and not a statement of facts, nor a statement of matters within his knowledge, all of which appears in Defendant's Bill of Exceptions No. 13 filed herein.

Sixty-seventh. The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs herein, over the objections of the defendant, that the plaintiffs had paid out for
398 freight charges for hauling material and supplies to the plant at Tecolote the sum of \$2280, for the reason that the same was immaterial and irrelevant to any issue in this case, and, for the further reason, that the evidence showed that the said Wm. Eichel did not have any personal knowledge of the payment of this amount, but relied upon books and accounts in his possession, which books and accounts were not made by him and the verity of which was not proven, all of which appears in defendant's Bill of Exceptions No. 14 filed herein.

Sixty-eighth. The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs, over the objections of the defendant, that the plaintiffs paid out for freight charges over

other roads than those operated by the defendant the sum of \$300.00, for the reason that the same was immaterial and irrelevant to any issue in this case, and for the further reason, that the same was not within the personal knowledge of the plaintiff Eichel but was a mere guess on his part, based, as far as based on anything, upon books and accounts not kept by him and the verity of which was not proven, all of which appears in defendant's Bill of Exceptions No. 15 filed herein.

Sixty-ninth. The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs herein, over the objections of the defendant, that the plaintiffs had paid out for repairs and material in repairs during the performance of the contract the sum of \$3300.00, for the reason that the same was immaterial and irrelevant to any issue in this case, and, for the further reason, that the testimony of the said Wm. Eichel showed that he had no personal knowledge of the verity of these figures but relied upon books and accounts which were not kept by him and the verity of which was not proven all of which appears in defendant's Bill of Exceptions No. 16 filed herein.

Seventieth. The trial court erred in permitting the introduction by the plaintiffs, over the objections of the defendant, of the by-weekly pay rolls, purporting to show the amounts paid for labor rendered in the performance of the contract sued on at Tecolote, for the reason that the said pay rolls were not made by the defendant, nor anyone acting for it, and, for the further reason, that they were not made by the plaintiff Eichel, during whose testimony on the stand they were admitted, and they were not proven to have been made truly by any person whomsoever, and, for the further reason, that they were as to this defendant hearsay, and the verity and correctness of which pay rolls were not testified to by any person whomsoever, and, for the further reason, that they, the said pay rolls, were not testified to by any person whomsoever to have represented work actually performed in the discharge of the said contract or necessary to be performed under the said contract, and for the further reason, that the said pay rolls did not show to whom the moneys therein purported to have been paid were in fact paid, nor for what purpose, and the truthfulness and accuracy of the same was not supported by the testimony of any person making the same or having any knowledge of the truthfulness and correctness of the same, and for all of which reasons the admission of the said pay rolls was prejudicial to the rights of this defendant and calculated to and did mislead the jury, and, for the further reason, that the said pay rolls were calculated to mislead and prejudice the jury, and did in fact prejudice and mislead them to defendant's injury, as appears from defendant's Bill of Exceptions No. 1 and to which reference is hereby made.

Seventy-first. The trial court erred in permitting the plaintiffs to introduce in evidence, over the objections of the defendant, the daily time checks, claimed by plaintiffs to evidence the payments for work done and the times for which payments were made under

the contract herein sued on, said time sheets being Exhibit
400 No. 49-1/2, for the reason that they were immaterial and irrelevant to any issue in the case, and, for the further reason, that they were hearsay, and that they were not made by defendant, nor anyone acting for it, and the verity and correctness of the same was not proven by the testimony of any person whomsoever, all of which appears in defendant's Bill of Exceptions No. 2, filed herein.

Seventy-second. The trial court erred in admitting in evidence, over the objections of the defendant, the pay rolls offered by the plaintiffs, and which were admitted as Exhibit No. 49 as shown by defendant's Bill of Exceptions No. 1 filed herein, because, as shown by said bill, the said testimony was hearsay, and the said pay rolls the privately prepared papers of the plaintiffs, unverified by any person, not proven by the sworn testimony of any person who made the same, or any part of them, or who saw them made, to have been truly made and kept, and the contents of which were not proven by the sworn testimony of any person having knowledge of the facts they purported to show.

Seventy-third. The trial court erred in admitting in evidence over the objections of the defendant, the time sheets offered by the plaintiffs and admitted as Exhibit No. 49 1/2, as shown by and described in defendant's Bill of Exceptions No. 2 filed herein, because, as shown by said bill, the said testimony was hearsay, and the said time sheets the privately prepared paper of plaintiffs, unverified by any person, not proven by the sworn testimony of any person who made them, or any part of them, or who saw them made, to have been truly made and kept, and the contents of which were not proven by the sworn testimony of any person having knowledge of the facts they purported to show.

Seventy-fourth. The trial court erred in admitting in evidence a catalogue issued by the Erie City Iron Works, partially descriptive of a certain engine, as shown by defendant's Bill of Exceptions No. 12 filed herein.

Seventy-fifth. The trial court erred in permitting the witness W. L. Miller, introduced by plaintiffs, to identify and
401 testify to the correctness of Exhibit No. 49 1/2, claimed to be the daily time sheets of the plaintiffs, for the reason that the said Miller showed by his testimony that he did not have any personal knowledge of the correctness of the same, and his testimony with reference thereto was hearsay, and, in particular, that he was not present and had nothing to do with the making and verifying of some of the same, the latter ones not being identified or segregated as shown by defendant's Bill of Exceptions No. 4 filed herein.

Seventy-sixth. Because the trial court erred in admitting testimony offered by the plaintiffs over the objections of the defendant which was harmful, immaterial, incompetent and irrelevant.

Seventy-seventh. Because the trial court erred in excluding testimony offered by the defendant which was competent material and relevant on the objections of the plaintiffs.

Seventy-eighth. Because the verdict is contrary to the evidence.

Seventy-ninth. Because the verdict is contrary to the law.

Eightieth. Because the verdict is contrary to the law and the evidence.

Eighty-first. Because the verdict is contrary to the instructions of the court.

Eighty-second. Because the verdict is excessive, and shows that the jury were prejudiced against the defendant or biased in favor of the plaintiffs, or that they misunderstood or disregarded the law as given in the charge of the court.

Eighty-third. The trial court erred in overruling defendant's general demurrer contained in defendant's first amended original answer to the first amended original petition of the plaintiffs:

Eighty-fourth. The trial court erred in not sustaining Special Exception No. 1 contained in defendant's first amended
402 original answer to plaintiffs' first amended original petition.

Eighty-fifth. The trial court erred in not sustaining Special Exception No. 2 contained in defendant's first amended original answer to plaintiffs' first amended original petition.

Eighty-sixth. The trial court erred in not sustaining Special Exception No. 3 contained in defendant's first amended original answer to plaintiffs' first amended original petition.

Eighty-seventh. The trial court erred in not sustaining Special Exception No. 3 contained in defendant's first amended original answer to plaintiffs' first amended original petition.

Eighty-eighth. The trial court erred in not sustaining Special Exception No. 5 contained in defendant's first amended original answer to plaintiffs' first amended original petition.

Eighty-ninth. The trial court erred in not sustaining Special Exception No. 6 contained in defendant's first amended original answer to plaintiffs' first amended original petition.

Ninetieth. The trial court erred in not sustaining Special Exception No. 7 contained in defendant's first amended original answer to plaintiff's first amended original petition.

Ninety-first. The trial court erred in not sustaining Special Exception No. 8 contained in defendant's first amended original answer to plaintiffs' first amended original petition.

Ninety-second. The trial court erred in not sustaining Special Exception No. 9 contained in defendant's first amended original answer to plaintiffs' first amended original petition.

Ninety-third. The trial court erred in not sustaining Special Exception No. 10 contained in defendant's first amended original answer to plaintiffs' first amended original petition.

Ninety-fourth. The trial court erred in not sustaining Special Exception No. 11 contained in defendant's first amended original answer to plaintiffs' first amended original petition.

Ninety-fifth. The trial court erred in not sustaining
403-1374 Special Exception No. 12 contained in defendant's First Amended original answer to plaintiffs' first amended original petition.

Ninety-sixth. The trial court erred in not sustaining Special Ex-

ception No. 13 contained in defendant's first amended answer to plaintiffs' first original amended petition.

Ninety-seventh. The trial court erred in not sustaining Special Exception No. 14 contained in defendant's first amended original answer to plaintiffs' first amended original petition.

Ninety-eighth. The trial court erred in not sustaining Special Exception No. 14A contained in defendant's first amended original answer to plaintiffs' first amended original petition.

Ninety-ninth. The trial court erred in not sustaining Special Exception No. 14C contained in defendant's first amended original answer to plaintiffs' first amended original petition.

One-hundredth. The trial court erred in not sustaining Special Exception No. 14D contained in defendant's first amended original answer to plaintiffs' first amended original petition.

One-hundredth and first. The trial court erred in its general charge to the jury in instructing them that, under the written contract sued on and in evidence before them, the defendant agreed to erect at its quarry at Tecolote, New Mexico, a crushing plant with an average capacity of 750 cubic yards in ten hours broken in the crushers to the maximum sizes that would pass through a three inch ring, the undisputed evidence showing that the defendant did not agree to erect a crushing plant with an average capacity of 750 cubic yards in ten hours or of any other average capacity whatsoever.

Respectfully submitted,

TURNEY & BURGESS,
HAWKINS & FRANKLIN,
*Attorneys for Defendant, El Paso &
Southwestern Railroad Company.*

Endorsed: No. 6840. In the District Court of the Forty-first Judicial District of the State of Texas for El Paso County. Eichel & Weikel vs. El Paso & Southwestern Railroad Company. Assignments of Error. Filed this 28th day of July, A. D. 1909. I. Alderete, Clerk District Court, El Paso Co., Texas, By M. M. Phinney, Deputy.

* * * * *

1375 The defendants introduced in evidence in proof, to establish the Laws of New Mexico, the following opinions rendered by the United States Supreme Court:

1st. Kihlberg vs. The United States, reported in the 97th U. S. Supreme Court Reports at page 398, substantially holding as follows:—"A contract between the United States and A, for the transportation by him of stores between certain points, provided that the distance should be ascertained and fixed by the chief quartermaster, and that A. should be paid for the full quantity of stores delivered by him. Annexed to the contract, and signed by the parties, was a tabular statement fixing the sum to be paid for each one hundred pounds of stores transported. The distance, as ascertained and fixed by the chief quartermaster, was less than by air line, or by the usual and customary route. Held, 1. That his action is, in the absence of

fraud, or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, conclusive upon the parties. 2. That A. was not entitled to compensation, according to the number of pounds received for transportation, in all cases where the loss in weight, occurring during transportation, was without neglect upon his part, but only for the number of pounds actually delivered by him."

2nd. *Sweeney vs. The United States*, reported in 109, U. S. Supreme Court reports at page 618, substantially holding as follows:

"When a contract with the United States for building a wall provides that payment for the work contracted for shall not be made until an agent, to be designated by the United States, certifies that it is in all respects as contracted for, and after completion of work the designated agent refuses to give the certificate, and there is no fraud, nor such gross mistake as would necessarily imply bad faith, nor failure to exercise honest judgment on the part of the agent, the engineer's certificate is a condition precedent to payment."

1376 3. *Martinsburg & Potomac R. R. Co. vs. March*, reported in the 114th U. S. Supreme Court Reports at page 549, substantially holding as follows:—

"A contract for the construction of a railroad provided that the company's engineer should, in all cases, determine questions relating to its execution including the quantity of the several kinds of work to be done, and the compensation earned by the contractor at the rates specified; that his estimate should be final and conclusive; and that 'whenever the contract shall be completely performed on the part of the contractor, and the said engineer shall certify the same in writing under his hand, together with his estimate aforesaid, the said company shall, within thirty days after the receipt of said certificate, pay to the said contractor, in current notes, the sum which according to this contract shall be due.' Held: That in the absence of fraud, or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, the action of the engineer in the premises was conclusive upon the parties."

4. *Chicago & Santa Fe Railroad vs. Price*, reported in 138th U. S. Supreme Court Reports at page 185, substantially holding as follows:—

"Where a contract with a railroad company for construction work provided for monthly payments to the contractor, 'on the certificate of the engineer', and that the determination of the chief engineer should be conclusive on the parties as to quantities and amounts, and where, in executing the contract each monthly account as made up by the division engineer was sent to the chief engineer, and the monthly payments were made on the certificate of the latter officer; his action in making such certificate was held to be a 'determination' under the contract, conclusive upon the parties in an action at law, in the absence of fraud, or of such gross error as to imply bad faith."

1377-1379 5. *United States vs. William Robeson*, reported in the 9th Peters Supreme Court Reports 371, at 375, substantially holding as follows:—

"That where parties to a contract fixed on certain modes by which

the amount to be paid shall be ascertained, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect; he cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract, or show that for time or accident he has been unable to do so. The contract being the law between the parties, in this respect, they expressly agreeing that the amount of the services rendered shall be established by the certificate of a designated person, the agreement to be binding upon them."

6. United States vs. Gleason, reported in 175 United States Supreme Court Reports, at page 588, substantially holding as follows:—

"That where, by the terms of the contract under which work was performed, it was agreed that an extension of time in which to complete the work depended upon the judgment of the engineer in charge when applied to to grant such extension, and in the absence of proof that he had acted in bad faith, or in dishonest disregard of the rights of the contracting parties, his judgment was final, and no appeal will lie therefrom."

7. Mercantile Trust Company vs. Henesey, reported in the 205 United States Supreme Court Reports, at 298, substantially holding as follows:—

"To the effect that when the plain language of the contract showed that the certificate of the supervising engineer was to be conclusive evidence of the completion of the contract and of the rights of claimants for the compensation demanded in the absence of that certificate, no judgment in his favor could be rendered unless it was shown that the inability to secure the certificates were due to the fraud or willful disregard of the rights of the demandant by the engineer."

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Opinion.

No. 4329.

EL PASO & SOUTHWESTERN RAILROAD Co., Appellant,
vs.
EICHEL & WEIKEL, Appellees.

Appeal from El Paso County.

As the statement of the nature and result of this suit set out in appellant's brief is acquiesced in by appellees, it will be adopted by us. It is as follows:

"Appellees brought suit in the District Court of the 41st Judicial District of Texas for El Paso County against appellant for alleged breach of contract and by amended original petition filed February 20, 1909, appellees in substance alleged:

That they were a firm composed of William Eichel and Adam Weikel and were citizens and residents of the state of Indiana, and that the appellant was a railroad corporation and a citizen of the Territory of Arizona; that prior to the 1st of November, 1905, they

were engaged in quarrying and crushing stone in Indiana and appellant was operating a railroad through the Territories of New Mexico and Arizona and El Paso County and that appellant desiring to procure a contract for the furnishing of ballast at Tecolote, in the Territory of New Mexico, and that it applied to appellees to bid upon said proposition, and that it, in order to induce appellees to bid on said proposition, represented to him that the climatic conditions existing at Tecolote were mild and equable so that the work of crushing stone could be carried on without interruption throughout the year and ballast produced with the plant, coal, water and other facilities to be furnished by appellant in such contract at 30 cents a cubic yard, and that as a matter of inducement appellant agreed to

have transported the machinery and equipment of appellees
1381 over the Rock Island Railroad to Tecolote at a cost to appellees of twenty-five per cent. of the regular freight rate on such material and equipment, but that without the consent of appellees it arbitrarily and wrongfully deducted and withheld from the moneys coming to appellees and earned under said contract the sum of \$1,674.87; that the climate at Tecolote was not as represented, but was so harsh and severe in the winter as to prevent operations in the production of said ballast, and at other times to greatly diminish the production thereof, and that during the winters of 1906 and 1907 appellees were forced to suspend operations entirely on account of the inclemency of the weather and that appellees during the times when they were forced to suspend operations were compelled to pay their employees \$690.56; that under the contract entered into between appellees and appellant for the production of said ballast appellees agreed to extract and produce from 200,000 to 300,000 cubic yards of ballast; that appellant under said contract agreed to deliver to appellees for the purpose of crushing stone from its said quarry "one complete crusher plant ready for operation consisting of one No. 7½ and one No. 5 gyratory Austin crusher, one ballast bin, one engine and one boiler plant, this entire crusher plant to be erected complete at the quarry and capable of crushing one thousand yards of ballast in ten hours; also two No. 3½ steam drills, one steam boiler with steam pipe and steam hose for drilling the quarry, one small Duplex pump with pipe connection for water supply," and also coal, water and railroad cars necessary to run the entire quarry and crusher equipment for the daily output of ballast, and that by said contract appellant stipulated that the maximum capacity of such crushing plant should be 1000 cubic yards of ballast crushed in ten hours. And appellees allege that appellant made default and failed to perform said contract and that the crushing plant furnished was not sufficient for crushing said amount of ballast and was incom-

1382 plete and insufficient in other respects and was incapable of crushing even 600 yards of ballast in ten hours, and that the coal furnished was unsuitable for the purpose and had to be screened, and the water furnished was impregnated with alkali, minerals and other foreign substances and in other ways unsuitable to such an extent as to cause foaming in the boilers, and that by reason thereof appellees lost large sums of money; that with proper climatic conditions and with suitable plant, coal, water etc. appellees could have produced ballast so as to have made a large profit, and plaintiffs

operated under said contract and produced ballast for defendant at great loss. And appellees in said petition allege in detail violations of said contract which will appear from the statements hereinafter contained in this brief, and asked for damages against the appellant in the sum of \$107,321.27.

Appellees filed with and attached to said complaint and made the same a part thereof the contract between the appellees and the appellant sued upon which contract is substantially as follows, to-wit:

Contract.

EXHIBIT C.

Agreement entered into this 13th day of December, One Thousand Nine Hundred and Six, between Eichel & Weikel, hereinafter called the Contractor, party of the first part, and The El Paso & Southwestern Railroad Company, hereinafter called the Company, party of the second part,

Whereas, the company desires to have delivered stone ballast on board its cars at Tecolote, N. M., in the state of —; and,

Whereas, the bid of the contractor for the work of delivering the said ballast has been accepted by the company:

Now, Therefore, in consideration of the mutual covenant hereinafter expressed, it is agreed as follows:

First. The contractor will deliver ballast as above specified for the company at Tecolote, New Mexico, in accordance with 1383 the drawings and specifications prepared under the direction of the Chief Engineer of said company subscribed by the said parties hereto and bearing even date herewith, which said drawings and specifications shall be considered as and are part of this agreement, equally binding herewith, and are marked "Exhibit A."

Materials.

Second. The contractor further agrees to furnish at own expense, under the direction and subject to the instruction and approval of said Chief Engineer or his authorized agent, all materials, tools and labor required by said drawings and specifications; to protect the said materials and labor from damage by the elements or otherwise until the completion of the work; to remove all materials, work or structures, rejected by the Chief Engineer, when directed by the said Chief Engineer or his authorized agent so to do, and to substitute instead such materials and work as in the opinion of said Chief Engineer or his authorized agent, are required by the drawings and specifications aforesaid.

Time.

Third. The contractor further agrees to deliver said ballast as specified in said attached specifications or that portion to the company free and discharged of all liens, claims or charges whatsoever, on or before the — day of —, nineteen hundred and — completely finished to the satisfaction of the Chief Engineer, to be evidenced by his certificate to that effect.

Consideration.

Fourth. The company, in consideration of the agreements aforesaid, agrees to pay or cause to be paid to said contractor, upon presentation of certificates signed by said Chief Engineer or his authorized agent, the following rates and prices: Forty-five cents per cubic yards, modified as stated in said attached specifications; and the following prices for extra work: — in lawful money of the United States, as follows: as stated in said attached specifications.

Payment.

On or about the twentieth day of each month, the value of 1384 the work, labor and material that have been placed in the before — mentioned — during the previous month, all of which shall have been furnished by the contractor under the terms of this agreement, shall be estimated by the said Chief Engineer or his authorized agent, and ninety per cent of this value shall be then paid, and the remaining ten per cent when the entire said contract shall have been completed in accordance with the terms of this agreement, and the drawings and specifications made a part hereof.

The company will be at liberty to furnish over its own lines free transportation for all men and tools furnished and employed on this work, to and from the contractor's recognized place of business, on the certificate of the Chief Engineer or his authorized agent, that such transportation is for the mutual benefit of the said company and the contractor; and, also, transportation over said lines for materials used in construction, free or at the rates specified below, provided that no free transportation or reduced rates shall be furnished, except as expressly agreed and specified herein.

Liquidated Damages.

Fifth. Damages for delays shall be deducted from the above named contract price at the rate of — dollars for each and every day after the — day of —, nineteen hundred and —, that the said — remains incomplete. The sum so forfeited to be retained as liquidated and ascertained damages out of any money that may be then due or owing, or may thereafter become due or owing, to the said contractor on account of — work and material under this contract.

Alterations.

Sixth. The company may, at any time during the progress of the work, make or require to be made any alteration or deviations 1385 in the plans, materials or workmanship, or any omission therefrom, that it may deem proper, without annulling or invalidating this contract. In case of such alterations, deviations or omissions from the plans or specifications involving any increased or diminished expense on the parts so altered, the amount to be allowed to the contractor or to the company shall be based upon the schedule of prices before mentioned in this agreement. If certain extra work is performed for which there is no price fixed by this

agreement, then the market value of materials and labor employed in such changes at the time such changes are made, which value shall be determined by the Chief Engineer, shall be paid for same; and in case such alterations or deviations require an additional time for execution, such additional time, as in the opinion of the Chief Engineer is fair and reasonable, shall be added to the time above stipulated for the completion of said work. Said market value and the amount of said additional time shall be determined at the time when said alterations or deviations are demanded, and this provision is an essential part of this contract and cannot be waived by either party.

Disagreement.

Seventh. The decisions of the Chief Engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; and each of the parties hereto waives any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants herein, so that the decision of said Chief Engineer shall, in the nature of an award, be final and conclusive on the rights and claims of said parties.

Failure to Complete.

Eighth. Should the contractor become bankrupt or insolvent, or assign his property for the benefit of his creditors, or become otherwise unable to carry on the work, or in case the contractor shall neglect or refuse to do so at any time for ten days in the manner required by the said Chief Engineer or his authorized agent, or in the case of any gross carelessness or incompetency on the part of the contractor, or in case the contractor shall assign this contract or any part thereof without authority, in writing, of said company, or in case of repeated failure to comply with the terms of this agreement and the drawings and specifications, then the company shall have the right, without avoiding or annulling the contract, to enter upon the work, provide such necessary materials and labor as the case may require, and remove all such defective materials or workmanship as in the judgment of said Chief Engineer or his authorized agent, may be found necessary, and carry the work to completion in such a way as shall be in accordance with the terms of this agreement, charging the cost of such labor and material to the contractor and deducting such charges from the above named contract price; provided the company shall have given the contractor ten days' notice in writing of its intention to do so.

Foreman.

Ninth. If any foreman or person in charge of any portion of the work covered by this agreement shall refuse or unreasonably neglect to comply with the requirements of said Chief Engineer, or his authorized assistant in regard to any materials or workmanship, the said foreman or other person shall, upon complaint of the Chief En-

gineer or his authorized assistant, be immediately discharged and not be given employment again upon any portion of the work.

Drawings, etc., to Co-operate.

Tenth. The drawings and specifications are intended to co-operate, so that any work exhibited on the drawings and not mentioned in the specifications, or vice versa, is to be executed as if mentioned in the specifications and set forth in the drawings, to the true intent and meaning of said drawings and specifications, without any extra charge whatsoever.

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Warranty.

Eleventh. Any repairs, renewals or replacements made necessary at any time during — months after completion of the work because of or growing out of defective materials or work done, shall be made by the contractor upon demand by the company, without cost to the company; or in the event of neglect by the contractor within five days after such demand to make such repairs, renewals or replacements, the company may make them itself, or through others, and the cost of so making them shall be a debt immediately due by the contractor to the company, and may be sued for as such.

Liability for Damage.

Twelfth. The contractor shall be responsible for all damages or injuries of every nature whatsoever done to persons or property during the performance of the work and occasioned by the said contractor's act or neglect, or that of any sub-contractor, foreman, laborer, or other employé or agent of the contractor, and the contractor does hereby indemnify and save harmless the company from and against all liability by reason of any such damage or injury, and the contractor will at his own proper cost and expense, make and maintain such temporary provision as may be necessary, by way of fences or otherwise, for the protection of persons and property during the performance of said work.

Liens.

Thirteenth. The contractor shall save and keep the crusher plant referred to in this contract and the lands on which the same are situated, free from any and all mechanics' liens or other liens. The company is hereby expressly authorized and directed to pay to any laborer, workman or mechanic, who shall have performed any work for the contractor, or any material man who shall have furnished materials, and who by any law or statutes is entitled to any preference in payment or lien, and who has complied with the requirements of such law or statute, if any, the amount of his claim, and deduct the amount of any such payment from the contract price or amount due from the company to the contractor; and such contractor shall, if required by the company, furnish any information necessary to enable the company to determine whether such laborer, workman or mechanic has performed such labor or

services, or material man has furnished the materials for which he claims payment, and under oath if so requested. The contractor shall also, if required by the company when payment is made by him, disclose the extent of his indebtedness to any laborer, workman, mechanic or material man who has not at that time requested the company to pay him for such labor, service or materials.

Insurance.

Fourteenth. The contractor shall, during the progress of the work, maintain full insurance on said work in his own name and in the name of the company against loss by fire. The policy shall cover all work incorporated in the crusher plant and all materials for the same in and about the premises, and shall be payable to the parties hereto as their interest may appear. The effecting of such insurance shall be a condition precedent to the right of the contractor to demand or receive payment of any installment above provided for.

Bond.

Fifteenth. Within ten days from the day of this agreement, the contractor shall execute and deliver to the company a good and sufficient bond in the full amount of the contract, with Aetna Indemnity Company as surety, or such other surety company as may be acceptable to the treasurer of the company, said bond to be conditioned for the faithful performance of the contract and all the covenants and provisions thereof.

Sixteenth. The contractor will comply with all municipal ordinances and regulations, obtain all required licenses and permits and pay all charges and expenses connected therewith.

1389 Seventeenth. The contractor will not sublet or transfer this contract, or any part thereof, or any interest therein, without the written consent of the company.

Eighteenth. It is covenanted and agreed by and between the parties hereto, for themselves, and their administrators, executors, successors and assigns, including the sub-contractor, if any, that this contract and all of its terms and provisions, shall be binding upon them, and each and every one of them.

Nineteenth. The company shall have the right to occupy said — before its final completion at any time before the same is ready for occupancy and said act shall not be considered as an acceptance thereof by said company, or as waiving any of the provisions of this contract.

Twentieth. Whereas, the foregoing work is done upon on for the railroad of the company, which railroad is being operated by the company; it is understood and agreed that the foregoing agreement is entered into by said company for the benefit of said company, for its own benefit, and that each and every covenant and agreement of the contractor herein shall be deemed and held to run also separately to and separately inure to the benefit of said company, and with the same effect as such covenant or agreement runs to said company, party of the second part; and may be separately enforced

against said contractor, his heirs, executors, administrators, successors and assigns, and also by said company, party of the second part, its successors and assigns.

In witness whereof, the parties hereto have executed this instrument in duplicate the day and year first above written.

EICHEL & WEIKEL, *Contractor*.

EL PASO & SOUTHWESTERN RAILROAD

CO., *Company*,

By H. J. SIMMONS.

"EXHIBIT A."

Specifications for Ballast.

1390 These specifications for the delivery of ballast, forming a part of the attached contract between Eichel & Weikel and the El Paso & Southwestern Railroad Company, witnesseth as follows, to-wit:

The Company, desiring to ballast portions of its road-bed and tracks in the Territory of New Mexico, with rock ballast to be taken from the Company's rock quarry, and crushed in the Company's rock crushing plant, both being located at Tecolote on the Company's line of road, 177 miles east of El Paso, Texas, and the proposals of the Contractor to deliver ballast to and on board the Company's cars at and from the said quarry and plant in accordance with the Company's specifications, having been accepted by the Company, the Contractor agrees to and with the Company as follows:

In consideration of the payment hereinafter mentioned to be made by the Company to the Contractor, the Contractor agrees to furnish all necessary labor, tools and equipment, except as hereinafter specified, without expense to the Company, and delivered on board the Company's railroad cars at the aforesaid quarry rock ballast crushed by the Contractor from said quarry, as per the specifications of this agreement, in quantities not less than 200,000 cubic yards nor more than 300,000 cubic yards, as shall be determined by the Company.

The Company, for and in consideration of the delivery by the Contractor of the ballast as above specified, and strictly in accordance with all of the terms and conditions of this agreement, agrees to pay to the Contractor the following prices:

For each cubic yard of stone ballast crushed by the Contractor and delivered on board the Company's cars at said quarry, the sum of 45 cents per cubic yard. For each cubic yard of screenings screened out of said ballast by the crusher screen and delivered on board the Company's cars at the quarry by the Contractor, the sum of 20 cents per cubic yard. For each acre of quarry site cleared as directed by the Company, the sum of one hundred dollars.

1391 For each cubic yard of stripping of material overlying the stone in the quarry, as directed by the Company, the sum of 20 cents.

The Company agrees to make the payments above specified on or about the 20th day of each month for all ballast, clearing and stripping and screening or done by the Contractor in accordance with the specifications of this agreement during the preceding calendar month, less than 10 per cent., which percentage shall be retained by the Company until the whole of the ballast required by the Company under the terms of this agreement shall have been delivered by the Contractor, when the said ten per cent, with all other payments that may be then due and payable to the contractor from the Company under this agreement, shall be paid to the Contractor upon the certificate of the Company's Engineer of Maintenance of Way that the Contractor has acceptably discharged all of his obligations under this agreement in conformity to the following specifications:

When required by the Company, the Contractor shall clear the quarry site of trees and rubbish that would interfere with working the quarry and payment therefor shall be made at the price per acre above specified for the area actually cleared.

When, in the opinion of the Company's Engineer Maintenance of Way, the quantity of earthy matter overlying the rock in place in the quarry is too great to be mixed with the stone as the latter is broken in the quarry, the Contractor shall remove such overlying earthy material of whatever kind, from the quarry site before the rock is drilled and broken, in which event the Contractor shall be paid for so removing the said earthy material at the rate per cubic yard for stripping above specified for each cubic yard so removed as directed by the company. The material shall not be deposited on the floor of the quarry without the consent of the Company.

The ballast shall be broken in the crusher to maximum 1392 sizes that will pass in any position through a two-inch iron ring, and shall be run over the crusher screens, the crusher and the screens being kept so adjusted that all large stone larger than the maximum size above specified shall be rejected by the large screens, and all dirt and stone, dust and chips less than one-quarter of an inch in size shall be screened out of the ballast by the small screen.

The ballast so crushed and screened shall be delivered into the ballast compartment of the ballast bin, and the dirt, dust and chips be delivered into the screenings compartment of said bin from which the ballast and screenings shall separately run into different cars.

When so loaded on the cars the ballast must be free of earthy matter tending to fill the voids in the ballast and preventing good drainage of the ballast when the latter is placed on the Company's roadbed.

The Contractor shall open and work the quarry in a manner that will develop and yield 300,000 cubic yards of ballast provided that quantity is found above a level plane fifteen feet below the top of the crusher hopper.

The quarry, as far as opened, shows hard, sound and durable limestone and all ballast must be of that quality of stone.

The volume of the ballast and screenings shall be delivered by measurement on board the Company's cars.

The maximum capacity of the crusher being 1,000 cubic yards of ballast crushed in 10 hours, the Contractor shall work the quarry and crusher at a rate that will develop 75 per cent. of the daily capacity of the crusher, or 750 cubic yards of ballast measured by volume on board the Company's cars for each day's work, provided that the Contractor shall not be required to attain and maintain the average daily output of 750 cubic yards before the expiration of sixty days from the date that he takes charge of and begins the operation of the crusher.

1393 The Contractor agrees that beginning with the expiration of the aforesaid sixty days, he will deliver on board the Company's cars from the crusher an average of 750 cubic yards of ballast for each and every day worked.

The Contractor agrees that he will provide all necessary stone from the quarry to the crusher at the rate that will insure the above specified daily output of ballast and that the crusher shall be kept working at the same rate.

The Company agrees to deliver to the Contractor without charge the following crusher and quarry equipment all new, viz:

One complete crusher plant ready for operation and consisting of one No. 7½ and one No. 5 gyratory Austin Crusher, 1 ballast bin, 1 engine and 1 boiler plant, this entire crusher plant to be erected complete at the quarry and capable of crushing 1000 cubic yards of ballast in ten hours; also two No. 3½ steam drills, one steam boiler with steam pipe and steam hose for drilling the quarry and one small Duplex pump with pipe connection for water supply.

The Company will also deliver to the Contractor on the work without charge to him, all coal, water and railroad cars necessary to run the entire quarry and crusher equipment at the rate above specified for the daily output of ballast; and should the Company fail on any working day to so deliver said coal, water and cars, and such failure should result in actual delay to the Contractor's work, then the Company will pay the Contractor for such delay at the rate of Fifteen Dollars per day of ten hours.

The Contractor agrees to take this equipment provided by the Company, run it, maintain it in good, efficient condition, and, on completion of the work under this agreement or its termination by the Company, return the entire equipment in good condition, less ordinary wear and tear, to the Company without expense to the latter.

1394 The Contractor agrees that he will provide whatever additional equipment that may be found necessary to secure and maintain the average daily output of 750 cubic yards of ballast per working day without expense to the Company.

The Company agrees to deliver the quarry site adjacent to the crusher plant and the stone therein to the Contractor without expense to him.

The Contractor agrees that he will vacate the quarry site and

remove all of his own equipment promptly on completion of the work herein specified or on the termination of this agreement.

It is further understood and agreed:

That the contractor shall begin the operation of the quarry and crusher as soon as same are delivered to him by the company, on or after January 1, 1906, and that he will continuously and energetically continue to operate same thereafter until the required quantity of ballast is delivered or this agreement is terminated by the company.

That should the Contractor on any working day after sixty days from the date of beginning work fail to deliver 750 cubic yards of ballast on board of the company's cars, then he shall forfeit to the company one cent per cubic yard for each yard actually delivered on that day for each 100 cubic yards that the day's delivery falls below 750 cubic yards; but should he exceed the required delivery of 750 cubic yards, then he shall receive one cent additional for each yard actually delivered for each 100 yards in excess of the required delivery of 750 cubic yards. If, under this penalty and bonus, the day's delivery should be 651 cubic yards, or 849 cubic yards, there would be no forfeit or premium, but should the delivery be 850 yards, then the contractor should have earned 850 cents, etc., etc.

That should the contractor habitually fall below a daily delivery of 600 cubic yards of ballast, then, in that event, the company may, at its option, terminate this agreement by giving the contractor ten days' written notice to that effect, addressed 1395 to his last known address, and by tendering to him the full amount of all payments due him, less the amount of all forfeitures against him under the terms of this agreement.

It is understood and agreed, however, that the contractor shall not be liable for failure to deliver the required daily output of ballast due to extraordinary causes or causes entirely beyond his control and foresight. He shall, however, be held strictly liable for the specified forfeitures on the price of ballast, for any failure to operate the quarry and crusher when there is nothing beyond his control to prevent the same, and he shall be required to operate the plant on each and every day when the weather conditions permit of a full day's work, strikes, Sundays, legal holidays and causes beyond his control excepted.

That the Contractor will employ only efficient tools and appliances and competent workmen upon the work, and that any incompetent, disorderly, or insubordinate workman will be removed from the work immediately upon the request of the Company's Engineer of Maintenance of Way.

That the Contractor will protect the Company at all times from all claims for damages of whatever character arising against him or the Company as the result, in any manner, or the prosecution of his work under this contract.

That the Contractor will protect the Company at all times from any liability for liens that might lie against the Company on account of unpaid labor or materials provided under this agreement:

That the Contractor will, if required by the Company, furnish evidence satisfactory to the latter that all charges for labor and material have or will be paid in full, and that the Company is amply secured against all liability for liens on account thereof, and that the Company may retain from any moneys due the Contractor under this agreement an amount sufficient to fully protect the Company against all claims as above specified until such time as said claims have been fully liquidated by the Contractor to the satisfaction of the Company.

That the Contractor will not sublet any portion of this work without the written consent of the Company, and that he will give his personal attention and supervision to the work.

The Company further agrees to furnish to the Contractor free transportation over its own railroad lines for all material, tools and labor necessary for the proper execution and completion of the whole of the work herein required.

The decision of the Company's Engineer of Maintenance and Way shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; and each of the parties hereto waive any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants herein, so that the decision of said Engineer of Maintenance of Way shall, in the nature of an award, be final and conclusive on the rights and claims of said parties.

The Contractor shall keep the crusher plant delivered to him by the Company insured in an insurance company acceptable and in favor of the company in the sum of \$7,500.00 for the period of time in which said crusher plant is in possession of the Contractor.

Within fifteen days of the day of this agreement, the Contractor shall execute and deliver to the company, a good and sufficient bond in the sum of Ten Thousand (\$10,000.00) Dollars with a surety company acceptable to the Company, said bond to be conditioned for the faithful performance of this contract, and all the covenants and conditions therein.

It is understood and agreed that all the work herein specified shall be done under the supervision and according to the directions of the Company's Engineer Maintenance of Way.

In witness whereof, the parties hereto have affixed their signatures on the day and date first above written.

EL PASO & SOUTHWESTERN RAILROAD
SYSTEM COMPANY,

By H. J. SIMMONS, *Gen. Mgr.*

1397 Contractor:

(Signed)

EICHEL & WEIKEL,
By WILLIAM EICHEL.

Witnesses:

For the Company.
PHIL FREY,
For the Contractor.

On March 8, 1909, appellant answered said petition and besides excepting to the same, as set forth more in detail hereinafter in this brief, and filing a general denial of the allegations contained therein, for special answer alleged:

First. That being desirous of ballasting the railroad track referred to in plaintiff's petition, it commenced the erection of a stone crushing plant on the line of said railroad at Tecolote, New Mexico, and partly completed the same, said crushing plant consisting among other things of a No. 7½ and No. 5 gyratory Austin Crusher, together with engine and boiler machinery and power sufficient for the operation thereof and buildings containing the same; that the same was erected and constructed along the line of such railroad and that appellant intended to itself operate such plant, but that some time before the construction was completed the appellees proposed to appellant that in event it would pay them at the rate and in the manner set forth in the agreement attached to plaintiff's petition, appellees would take over the operation of such plant, pay all the expenses thereof, maintain such plant and furnish therefrom to appellant at least 750 cubic yards per ten hour day of stone crushed for ballast as described in said agreement, and that before making such proposition to appellant the appellees went to and upon such plant and fully examined the same, and the machinery placed therein, and that at the time of such examination all of the machinery to be delivered to appellees under the contract was on

1398 the ground and was examined by appellees and their expert.

That appellees informed appellant that they were experienced men in the handling of rock crushing plants and familiar with the machinery used and required therefor, and at the time of the examination of the same expressed to appellant their satisfaction of the fact that such plant as then practically constructed was of sufficient character and capacity to produce a maximum amount of 1000 cubic yards per ten hour day from the character of stone found in the quarry and provided by appellant, which was adjacent to said plant, and that the furnishing of such plant by appellant would be a full compliance on the part of appellant with the contract by which it undertook to furnish the crushing plant as mentioned in plaintiff's petition, and such agreement on the part of appellees was an inducement to appellant to enter into the contract aforesaid, and thereupon appellant did enter into said contract with appellees. That before entering into such agreement one of the appellees went upon the ground where such plant was situated and familiarized himself with the circumstances and conditions under which the crusher plant was being constructed and under which it was necessary to operate the same, for the purpose of determining the character of such plant and the character of water and coal that would be obtainable for the operation of such plant, and that by such investigation appellees ascertained, or by reasonable diligence could have ascertained, the character of such water and coal, and from such investigation knew, or by the use of reasonable diligence could have known, the same, and that the character of such coal and water was a matter of general knowledge in the section in which

such plant was located and that appellees knew at the time when they made the contract that the water and coal therein referred to in said contract was the kind and character of water and coal in fact furnished by appellant to said appellees under said contract; that appellant prior to such time and for a long time previous thereto had at an enormous expense thoroughly investigated and tried by the boring of wells and otherwise to develop water for use in 1399 locomotives and steam boilers and engines which was free from such impurities as rendered the same less available for such purposes, and that there was a large section of country around Tecolote where appellant had been unable to find any quantity of water except in the very smallest amounts and soon exhausted, which was fit for use for steam making purposes without treatment, and that therefore they had erected at great expense plants for the treatment of water and that there was no practical supply of water suitable for steaming purposes without treatment in that section of country at the time when said contract was entered into and during the time when the appellees were operating said plant. All of which facts were known to appellees, or could have been ascertained by them by the use of reasonable diligence, before such contract was entered into.

That the plant was sold to appellant and erected by the Austin Manufacturing Company, of Chicago, Illinois, in accordance with plans and specifications fully agreed upon between them, which plans and specifications were shown to appellees and explained to them before the making of such contract; that appellees in entering into such contract contemplated and understood that it would be necessary for the housing, protecting and feeding of employes; that said Tecolote is a point on such railroad remote from all places of supplies or building material and none were obtainable nearer than Alamogordo, a distance of about ninety miles, and that appellees, notwithstanding they had knowledge of these facts, neglected to properly order or procure any lumber or other building supplies until they had brought their employees to Tecolote. That the Austin Manufacturing Company had used a portion of the lumber, which they had brought to Tecolote for the purpose of housing said plant, in the construction of a house for the protection of their employees and that when appellees came there they agreed with the Austin Manufacturing Company that if they would turn over to them the houses so constructed by said last named company, that they (appellees) would complete the construction of the houses necessary to protect said plant.

1400 That said plant was rated in the catalogue of the manufacturers of same as a 1000 yard plant, but that the capacity of a plant of this character of necessity is controlled by the character of stone to be crushed and the size to which the same is to be crushed, all of which facts were communicated to appellees by appellant and known by them prior to entering into said contract; that in order to thoroughly determine the capacity and character of said plant, appellees before entering into said contract brought to Tecolote an expert to inspect the same and advise appellees in regard

thereto and that said expert did inspect said plant and advise the appellees as to its capacity before they entered into said contract; that appellant had not accepted said plant from the Austin Manufacturing Company, but had awaited doing so until by test it was ascertained that the same had the capacity agreed upon, to-wit: a maximum capacity of 1,000 cubic yards per ten hour day; that after such inspection appellees advised appellant that such plant was adequate and acceptable to them, and appellant thereupon accepted such plant as being constructed in accordance with the terms of said agreement between said Austin Manufacturing Company and appellant and delivered the same to the appellees, who accepted it; and appellant alleged that said plant was in fact constructed in accordance with the agreement between it and appellees and capable of producing the amount of stone provided in said contract when properly operated, but that the same was operated in such a negligent, careless and inefficient manner that if it did not produce such amount of stone, it was the result of such careless, negligent and inefficient operation, and that as a result thereof the efficiency of such plant was greatly damaged and lessened. And appellant also alleged that said quarry was improperly operated and set out in detail the manner in which said plant and quarry were improperly operated.

Second. That if it was agreed that appellant should carry commissary supplies for appellees, it was understood that the same should be used only for furnishing supplies to employees engaged 1401 in the work of producing said ballast, and that shortly after the making of said contract appellees commenced using said supplies in conducting a general merchandise business and selling such supplies to others than such employees and that thereupon it became contrary to law for appellant to carry said supplies free and this appellant thereupon charged for the carriage of the same.

Third. That any agreement on the part of appellant, if any such was made, to carry commissary supplies free was void because it appeared that it was the purpose of appellees to use said commissary supplies in carrying on a general mercantile business and selling same to all parties, regardless of their employment by appellees.

Fourth. That it was contemplated and agreed between appellees and appellant in the contract sued on that the work and labor therein agreed by the appellees to be performed should be done and finished to the satisfaction of the Chief Engineer of appellant; that the payments therein agreed to be made by appellant should be made to said appellees upon presentation of certificates signed by said Chief Engineer or his authorized agent. That on or about the 20th of each month the value of the work, labor and material done and furnished during the previous month should be estimated by said Chief Engineer, or his said agent, and payments made by appellant in accordance with and under said estimates, and the value of extra work performed should be determined by such Chief Engineer and payments made in accordance with such determination. That when the whole of the ballast required by appellant under the terms of said agreement was delivered by the appellees the ten per cent. retainage provided by the contract and all other amounts due thereunder should be paid upon certificate of appellant's Engineer of Maintenance of Way that appellees had acceptably discharged all of their obligations

under said agreement in conformity with certain specifications therein particularly set out; that the decision of the appellant's Engineer of Maintenance of Way should be final and conclusive in all disputes which might arise between parties to said agreement relating to or touching the same, and that each of the parties to said agreement waived any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants therein contained, so that the decision of the Engineer of Maintenance of Way should, in the nature of an award, be final and conclusive on the rights and claims of said parties.

That said contract was made and to be performed within and with reference to the laws of the Territory of New Mexico, and such was the intention of the parties in making such contract; that there was in the Territory of New Mexico at the time when said contract was so made a certain non-statutory and unwritten law to the effect that agreements such as those specifically plead, as embodied in said contract, are valid and binding and that neither of the parties to such contract and agreement have any right of action in a cause based thereon, but must rely upon the decision of said Chief Engineer or Engineer of Maintenance of Way, and therefore appellant alleged that said appellees should not be allowed to maintain their cause of action because the said Engineer of Maintenance of Way had not certified that the appellees had acceptably discharged all of their obligations under said contract, nor had said Engineer of Maintenance of Way ever determined that there was anything due from appellant to appellees on account of any of the matters or things by the said appellees complained of, and because the said appellees had never submitted to said Engineer of Maintenance of Way the matters and facts so by them complained of except as referred to in the plea next hereinafter mentioned, and all of the same are in dispute between the appellees and the appellant and arise out of, relate to and touch said contract, but that all of the same which have been in fact submitted to said Engineer of Maintenance of Way have been passed upon and determined by him and that appellant has fully paid to appellees all amounts determined by said Engineer of Maintenance of Way to be due under said contract.

Fifth. And for further special answer appellant alleged that it was agreed by said contract that the work and labor to be performed thereunder should be done to the satisfaction of the Chief Engineer and that the payments therein agreed to be made to appellees should be made upon presentation of certificates signed by said Chief Engineer, or his authorized agent, upon estimates to be made by said Chief Engineer, or his authorized agent, less ten per cent retainage until the completion of said contract, and payments for extra work at a rate to be determined by said Chief Engineer; that when the whole of the ballast required by appellant was delivered to it by the appellees the ten per cent retainage, with all other payments then due, should be paid to appellees upon certificates of appellant's Engineer of Maintenance of Way to the effect that appellees had acceptably discharged their obligations under said agreement; that the decision of the appellant's Engineer of Maintenance of Way should be final and conclusive in all disputes between the parties relating to or touching the contract, and each of

the parties waived any right of action, suit or suits, or other remedy in law or otherwise by virtue of the covenants contained therein, so that the decision of the said Engineer of Maintenance of way should, in the nature of an award, be final and conclusive; that said contract was to be performed within and with reference to the laws of the Territory of New Mexico and that under said laws existing at the time of the making of the same all of said agreements contained in said plea were valid and binding and that neither of the parties to such contract had any right of action in a cause based thereon, or in the covenants or agreements therein contained, but must rely for a decision of such rights and claims on the determination thereof by said Chief Engineer or Engineer of Maintenance of Way, and that said contract was under the laws of the Territory of New Mexico valid and enforceable, and therefore appellant alleged that the appellees should not be allowed to maintain their cause of action, because during each month subsequent to any month when the appellees produced and delivered to the appellant any ballast under the terms of said contract, the appellant's Engineer of Maintenance of Way, acting upon his own authority as provided in said contract and also as the designated agent of Appellant's Chief Engineer,

1404 estimated and determined the amount of compensation due to said appellees under said contract, and in estimating and determining the same determined the amount of penalty which appellant had a right to assess against appellees for failure to perform their contract and the amount of damages due to appellees on account of any delays which had been occasioned to them as provided in said contract by the fault of appellant, and had from month to month certified thereto, and appellant, in each instance after deducting ten per cent of the amount of compensation so allowed to said appellees paid the remainder thereof to them, which amounts have been received by the appellees in full settlement of the amounts due them at said respective periods under said contract and in full satisfaction of all damages and allowances on account of any delays or expenditures which have been caused to appellees.

That while appellant alleged that the appellees have never fulfilled their contract with appellant, yet that in December 1907 the appellees refused to longer perform the same or furnish any ballast to appellant thereunder, and that thereupon appellant treated said contract as having been terminated, and therefore the last estimate of said Engineer of Maintenance of Way for the month in which the last work was performed became, as far as the liability of appellant is concerned, the final certificate of such Engineer of Maintenance of Way as contemplated in said contract, by which estimate it was determined that the appellant owed to the appellees the sum of \$4,707.53, which has been paid, except only a ten per cent retainage, for which appellant claims a lien in accordance with its plea.

Sixth. And appellant alleged that by said contract the question as to whether or not the plant had the capacity called for by the contract and whether or not the water and coal was of the character therein required to be furnished, was committed to the decisions of the Engineer of Maintenance of Way and the Chief Engineer of appellant.

Appellant further alleged that in giving to the Engineer of Main-

tenance of Way and Chief Engineer of appellant power to pass upon the performance of the contract they had especially in view that the same included the right to determine whether or not the plant had the capacity called for by the contract, or the water and coal

1405 furnished for use was of the character agreed to be furnished, and the character of the stone crushed, and that the certificate of said Engineer as to the matters so committed to his decision is necessary to enable the appellees to recover. That the said Engineer of Maintenance of Way did determine that said plant had a maximum capacity of 1000 cubic yards per ten hour day and an average capacity of 750 cubic yards, and determined that said coal and water was such as called for under said contract and suitable for the uses to which the same were to be put.

Seventh. That after the completion of all the work contemplated by the original contract between appellees and appellant there were disputes as to the amount due by appellant to appellees and undetermined questions, and that a settlement was reached between them whereby all charges of every kind were determined and agreed to by the parties hereto, and said settlement showing a balance in favor of the appellees, same was by the appellant paid to the appellees and accepted by them, and that thereby appellees are concluded from making any further claim by reason of any of the matters or things set up in their petition.

Eighth. That appellant has paid to appellees all that it owes to them under said contract.

Ninth. Appellant also plead an estoppel.

Tenth. Appellant also set up counter-claim by which they asked for damages against appellees in the sum of Ten Thousand Dollars.

By supplemental petition appellees replied to said answer and expected to certain portions of the same, and also alleged that they offered to furnish to the Engineer of appellant any facts in their possession and that they had invited the Engineer of appellant to call on them for information and that his failure to act in the premises was capricious and arbitrary and fraudulent as to them. They also denied that they ever accepted said plant, or that the same did have the capacity called for by the contract, that said Engineer of Maintenance of Way did not pass on the question as to the sufficiency of the coal and water, and that they never agreed to the construction of the contract contended for by appellant, that
1406 the weather conditions at Tecolote and the character of the coal and water and the inefficiency of the plant were known to them.

Said cause came on to be heard on the 8th day of March, 1909, and the general demurrer contained in appellant's amended original answer and special exceptions Nos. one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fourteen-a, fourteen-c and fourteen-d were overruled; and the court overruled special exceptions one, two, three, four, five, six, seven, eight, nine, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen and twenty contained in appellees' supplemental petition. The trial of the case continued until the 20th day of April, 1909, when the jury returned a verdict against appellant and in favor of the appellees for \$32,680.64, less the sum of \$943.84, making a net

amount of \$31,736.80, with interest from January 1, 1908, and the court rendered judgment in accordance with said verdict."

This appeal is from the judgment rendered on the verdict.

Conclusions.

The first assignment of error complains of the court's instructing the jury that the defendant guaranteed that the rock-crushing plant furnished by it to plaintiffs had a maximum capacity of crushing 1000 cubic yards in ten hours per day.

The second is directed against that part of the court's charge which instructs the jury that under the contract sued on the defendant agreed to erect at its quarry at Tecolote, New Mexico, a complete crushing plant, consisting of boilers, engines, crushers, elevators, screens, ballast, bins, etc., with a maximum capacity at the quarry of 1000 cubic yards in ten hours, and with an average capacity of 750 cubic yards in ten hours, broken in crushers to the maximum size which will pass through a three-inch ring, together with two No. 3½ steam drills, one steam boiler with steam pipe and hose for drilling the quarry, and one small duplex pump with pipe connections for water supply.

1407 The tenth is predicated upon the court's refusal to charge the jury on defendant's request that there was no warranty or agreement in the contract sued on that the plant developed thereunder should have a maximum capacity of 1000 cubic yards of ballast in ten hours.

The basis of the eleventh assignment is the failure of the court to charge the jury, as requested by defendant, that plaintiffs were not entitled to any damages on account of the insufficiency or lack of capacity of the crushing plant, engines and boilers if insufficient or lacking in capacity for the reason that defendant did not warrant the capacity of the plant, but only specifically described it as "one capable of crushing 1000 cubic yards of ballast in ten hours," the words being of description and not of warranty; and that by the terms of the contract plaintiffs obligated themselves to install all such additional equipments that might be found necessary to secure and maintain an average daily output of 750 cubic yards for each working day.

The sixty-second assignment of error complains that the trial court erred in instructing the jury that, under the written contract sued on, the defendant agreed to erect at its quarry a crushing plant with an average capacity of 750 cubic yards in ten hours, broken in the crushers to the maximum size that would pass through a three-inch ring, the undisputed evidence showing that the defendant did not agree to erect a crushing plant with such average capacity.

As the five above-mentioned assignments of error relate to the construction of the contract in regard to the question of guaranty or warranty they will be considered and disposed of together; for it is obvious that the disposition of one will have the effect to dispose of them all.

The prime object in construing a contract is to ascertain and give

effect to the intention of the parties; for their intention, when ascertained, is the law by which their rights are determined.

1408 In order to ascertain their intention, the contract must be construed as an entirety and all its features seen together so as to perceive the intention expressed on its whole face. If the language used in expressing the intention be not so obviously clear as to leave no room for construction, the problem to be solved is not what the separate parts of the contract mean, but what it means when considered as a whole. Even though its separate parts may be clear and free from ambiguity, the same principle governing its construction obtains; for one part may affect the construction of a different part. But when several provisions are inserted the contract should, if possible, be so construed as to give effect to each provision, and in such way effect will be given to it as an entirety.

Since it is to be construed as a whole, terms which can be clearly implied from a consideration of the entire instrument are as much a part of the contract as though plainly written on its face. This principle is usually invoked where questions of mutuality are concerned, the rule being that if the consideration relied upon for one executory promise of a party is another such promise of the other party to the contract, each promise must be binding in order to constitute a legal obligation and valuable consideration. Although the promise relied upon as a consideration may not be expressly stated in any clause of the contract, yet if it appears from the entire instrument that such promise was intended, it will be as binding and as much a valuable consideration as though it were expressly stated.

It will be observed from reading the contract upon which this action is founded that it contains no express guaranty or warranty that the plant to be furnished by the defendant should have a maximum capacity of crushing at its quarry at Tecolote 1000 cubic yards in ten hours. (Here we will note that the words "guaranty" and "warranty" are used in the briefs of counsel of either party interchangeably and as of the same meaning; and that as used in the record before us, "guaranty" is given the meaning of "warranty.")

The question then is, construing the contract as an entirety, is such a warranty of the capacity of the plant clearly implied?

1409 To avoid confusion, it may be well to state the meaning of the word "warranty" in its application to contracts.

Some of the uses of the term, as found in the reports, are thus stated in a note in Anson on Contracts (Huffcut's edition):

"(1) It is used as equivalent to a condition precedent in the sense of a descriptive statement vital to the contract. *Behn v. Burness*, 3 B. & S., 751.

(2) It is used as equivalent to a condition precedent in the sense of a promise vital to the contract. *Behn v. Burness*.

(3) It is used as meaning a condition the breach of which has been acquiesced in and which therefore forms a cause of action but does not create a discharge. *Behn v. Burness*.

(4) In relation to the sale of goods it is used as an independent subsidiary promise, 'collateral to the main object of the contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods.' *Chanter v. Hopkins*, 4 M. & W., 404.

(5) In relation the sale of goods, warranty is used for an express promise that an article shall answer a particular standard of quality, and this promise is a condition until the sale is executed, a warranty after it is executed. *Street v. Blay*, 2 B. & A., 456.

(6) Implied warranty is a term used very often in such a sense as to amount to a repetition by implication of the express undertaking of one of the contracting parties. Thus there was said to be an implied warranty in an executory contract of sale that goods shall answer to their specific description and be of a merchantable quality. This is now an implied condition. *Sale of Goods Act*, §§ 13, 14. *Jones v. Just*, L. R. 3, Q. B., 197."

By the same eminent authority it is said, "Contracts are often made up of various statements and promises on both sides, differing in character and importance; the parties may regard some of these as vital, others as subsidiary, or collateral to the main purpose of the contract. When one of these is broken the court must discover, from the tenor of the contract or the expressed intention of the parties, whether the broken term is vital or not. If the parties regarded the term as essential, it is a condition: its failure discharges the contract. If they do not regard it as essential, it is a warranty: its failure can only give rise to an action for such damages as have been sustained by the failure of that particular term. A condition precedent, in this sense, may be defined as a statement or promise, the untruth or failure of which discharges the contract. A warranty is a more or less unqualified promise of indemnity against a failure in the performance of a term in the contract." The author then fully explains and illustrates the difference in the meaning of the terms by citing and discussing adjudicated cases involving their application.

Again, it is said by Sir Frederick Pollock: "No small confusion has been caused by the use of the word warranty where the thing meant in the first instance is really a condition. The proper meaning of warranty appears to be an agreement which refers to the subject-matter of a contract, but, not being an essential part of the contract either by the nature of the case or by the agreement of the parties, 'is collateral to the main purpose of such contract.' The so-called implied warranties of quality, fitness and condition of goods sold are really conditions; if the goods tendered in performance of the contract do not satisfy those conditions, they may be rejected. But the buyer may, if he thinks fit, accept the goods and claim damages for the defect; in other words, he may treat the breach of a condition as a breach of warranty. And after goods have been accepted, or the property in specific goods contracted for has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect. Conditions of this kind include a warranty from the first, and may be reduced to a warranty if the buyer does not take advantage of them at the time. But a condition and a warranty are not, therefore, the same thing." *Wald's Pollock on Contracts* (3rd ed.),

655. This definition of the word warranty, as well as the illustration of the meaning, in its application to a contract of this character, is more satisfactory to us than any other; and it will therefore be taken in that sense in determining the question under consideration.

In construing the contract with regard to the object and purpose which the parties had in view in entering into it, the part by which the defendant obligated itself to furnish plaintiffs with the crusher, and certain machinery and instrumentalities for operating a plant to the end of supplying it with the stipulated amount and quality of ballast per day may be taken and considered as analogous to a sale by one party to another of such a plant with the knowledge on the part of the seller of the object and purpose which the buyer had in view in making the purchase. Suppose, for illustration, a case where a contractor has a contract with a railway company to furnish it with a given quantity and quality of ballast per day until a stipulated quantity is supplied, and with a view of performing his contract he desires to purchase a stone-crushing plant with a maximum capacity at a certain quarry of 1000 cubic yards in ten hours, he should go to manufacturer or dealer in such machinery and state to him fully his contract with the railway company and that he wants to purchase machinery and instrumentalities with which to install a plant for the purpose of performing his part of the contract and the manufacturer or dealer, with the knowledge thus obtained of his contract with railway company and of the desired capacity of the crusher, machinery and instrumentalities for operating the plant, should point out to him a certain crusher with machinery and instrumentalities for operating it and represent to the contractor that such crusher, machinery and instrumentalities would constitute a plant of the crushing capacity he desired and that, relying upon such representations being true, he should purchase and, after properly installing and operating the same, discover that the plant was materially lacking in the capacity desired by him and which it was represented to have by the manufacturer or dealer and that by reason thereof he was unable to supply the railway company the stipulated quantity and quality of ballast per day he was obligated by his contract to do, such representation by the manufacturer or dealer from whom the contractor made the purchase would, under the definition of the term, be a warranty, and the failure of the plant, if properly installed and operated, to meet such representation would be a breach of such warranty subjecting the warrantor to all such damages, as might have been reasonably anticipated, which the purchaser sustained by reason of the breach. *Jones v. George*, 61 Tex., 345; *Ellis v. Riddick*, 78 S. W., 719; *Barnum Wire & Iron Works v. Seley*, 77 S. W., 827; *Dean v. Standifer*, 37 Tex. Civ. App., 181, 83 S. W., 230; *Hobart v. Young*, 63 Vt., 363, 21 Atl., 612.

No particular form of words is required to constitute a warranty; any positive affirmation of facts, as distinguished from an expression of opinion, intended as a warranty, or received and acted upon as such, will be enough. *Blythe v. Speake*, 23 Tex., 430; *Ellis v. Riddick*, 34 Tex. Civ. App., 256; 3 *Suth. Dam.* (2 ed.), § 668; *Beach on Modern Law of Contracts*, § 259; *Mech on Sales*, § 1214.

It seems to us that under the terms of the contract, which are in writing and cannot be disputed, the warranty on the part of defendant of the maximum capacity of the rock-crushing plant it agreed to furnish plaintiffs is as clearly raised by implication, as it would be had such plant been purchased by plaintiffs from a third party, who was fully informed of the object and purpose they had in view in making such purchase and the use that was to be made of the plant by the buyers, and the seller had at the time represented to them that the plant had a maximum capacity of crushing 1000 cubic yards of ballast in ten hours a day. If possible, the implication of a warranty arising from the contract, when all its parts are construed together, is clearer in this case than it would be in the supposed
1413 case of a sale. The contract being in writing, and there being no ambiguity in its terms, it was for the court to construe it, and decide whether it contained a warranty of the capacity of the plant to be furnished by the defendant or not. *Wason v. Ruwe*, 16 Vt., 525; *Hobart v. Young*, 63 Vt. 363, 21 Atl., 614.

In the cases cited in the briefs of appellants' counsel in support of their contention that there was no guaranty or warranty on the part of the defendant that the crushing plant it furnished plaintiffs had a maximum capacity of crushing 1000 cubic yards in ten hours a day, the parties to those suits who claimed the respective contracts involved contained a warranty used the term as equivalent to a condition precedent in the sense vital to the contract, and the several courts deciding the cases, having in view the sense in which the word was used simply held that there was no such warranty as a breach of which would discharge the contract. While defendant's undertaking to furnish plaintiffs a crushing plant was a condition precedent to the contract which its failure to perform would have discharged it, the stipulation as to the maximum capacity which the plant should have was not taken as such, but merely as collateral to the contract and therefore was properly designated and considered by the court as a warranty for the breach of which defendant was liable for all the damages that proximately ensued to plaintiffs therefrom.

The stipulation as to the maximum capacity is plainly written in the contract, and the evidence is amply sufficient to show that the maximum capacity of the crushing plant which the defendant furnished the plaintiffs was materially less than it was warranted to possess and that by reason of the absence of such maximum capacity the plaintiffs sustained much of the damages claimed.

We, therefore, overrule all of the above-mentioned assignments of error.

2. The third assignment of error complains of the court's instructing the jury that "If the defendant agreed with the plaintiffs
1414 to furnish free transportation over its own lines of all supplies and materials necessary for the operation of the plant or for goods, wares and merchandise to be used in connection with the operation of same." the plaintiff could recover such charges.

The objection urged to this part of the charge is that the contract between the parties is in writing and contains no such provision.

The only provision that can have any relation to free transportation of supplies, etc., over defendant's lines is as follows:

"The Company will be at liberty to furnish over its own lines, free transportation for all men and tools furnished and employed on this work, to and from the Contractor's recognized place of business, on the certificate of the Chief Engineer or his authorized agent, that such transportation is for the mutual benefit of the said Company and the Contractor; and, also, transportation over said lines for materials used in construction, free or at the rates specified below, provided that no free transportation or reduced rates shall be furnished, except as expressly agreed and specified herein." This, it seems to us, is not open to construction. The rule that courts will ordinarily give a contract the same construction that has been placed upon it by the parties, has no application to a contract which is free from ambiguity and its meaning obvious. It is patent from the provision just quoted that the defendant did not obligate itself to furnish plaintiffs free transportation over its lines of railway of material, supplies, etc., necessary for the operation of the plant or to be used in connection with its operation. It was simply at liberty to do so or not just as it pleased; nor do we think any other construction can be given it from the action of the parties regarding such matters. However, one of appellees' counter propositions under the assignment is, "If the charge of the court in allowing plaintiffs to recover for freight charges over the defendant's own line was error, the item of damages, being separate, may be remitted." While

we sustain the assignment of error, we accept this counter
1415 proposition as correct, and should we conclude that there is no other error fatal to the judgment will require a remittitur by the plaintiffs of \$513.00, the full amount of the item of damages to which the erroneous part of the charge relates. This also disposes of the ninth assignment.

3. The fourth paragraph of the charge is as follows: "Now if you believe from a preponderance of the evidence that the said crusher plant so agreed to be installed by the defendant, as actually installed by the defendant at Tecolote, New Mexico, did not in fact have a maximum capacity for the production of a thousand cubic yards of ballast in ten hours from the stone at Tecolote quarry when properly fed and the plant properly operated, and that by reason thereof the amount of ballast produced by the plaintiffs during the time they were operating said plant in the years 1906 and 1907, exclusive, however, of the time lapsing and ballast produced from October 1st, 1906, to November 7th, 1906, inclusive of both dates, was reduced below the average of seven hundred and fifty cubic yards of ballast per ten hour day, and that plaintiffs did operate said plant with reasonable care, management and diligence and that had said plant actually had a maximum capacity of a thousand yards of ballast per ten hour day and been capable of producing an average of seven hundred and fifty yards per ten hour day, that when the amount of ballast turned out by the plaintiffs would have exceeded the amount actually turned out by them, or believe that the coal or water, or both, furnished by the defendant to the plaintiffs for

the operation of said plant was not reasonably suitable for the purpose intended by the parties, and actually reduced the capacity of the plant and the actual output of ballast, and that had the coal and water so furnished been reasonably suitable and adapted for the purposes for which they were intended by the parties, the actual output of ballast would have been increased, and you believe from the evidence that said ballast actually produced by the plaintiffs

during the time named would have been produced in a shorter time and at a less actual cost to the plaintiffs, then and in that event you will find in favor of the plaintiffs for the difference, if any, between the reasonable actual cost to plaintiffs of all ballast actually produced, except that produced from said October 1st to November 7th, inclusive, 1906, and what you believe from the evidence it would have reasonably cost them to produce the same had the said plant had a maximum capacity at said quarry of a thousand cubic yards of ballast per ten hours, if it had not, and had the coal and water so furnished by defendant been of a quality reasonably sufficient and suitable for the production of steam for the operation of said plant, if it was not.

You are instructed in this connection that there can be no recovery by plaintiff for any additional cost, if any, of the production of ballast between October 1st, 1906, and November 7th, 1906, arising out of any default, if any, on the part of the defendant, for under the undisputed evidence, the defendant and plaintiffs have adjusted and settled any damage, if any, accruing to the plaintiffs by reason of additional cost, if any, of the production of ballast, during said period. The amount of ballast produced during said period, the evidence shows was, twelve thousand eight hundred and ninety-seven cubic yards."

It is the subject of the fourth assignment of error. Under it are advanced these propositions:

(1) "The appellant and appellees having entered into a contract by which for an adequate consideration the appellees agreed to supply appellant with crushed stone at a price agreed on, and having accepted from appellant the plant erected for that purpose and having operated the said plant and received for its output the contract price, and without protest, appellees should be and are estopped from claiming any additional compensation by way of damages for increased cost incurred by them in producing the ballast as over and above the price at which it might have been produced under different circumstances."

(2) "The appellees having abandoned their contract and declined to carry out the same, were not in a position lawfully to demand of the appellant the profit they would have made upon the performance of the work not in fact performed and the completion of which they had abandoned."

(3) "The appellant and appellees having entered into the contract sued on by which appellees agreed to supply appellant with crushed stone at the price agreed on, and having accepted from appellant the plant erected for that purpose and operated the said plant and received from its output the contract price without protest, and

having agreed to the correctness of the reports made by Harrison to the Chief Engineer and upon which such payments were based, and from which penalties and royalties were determined and allowed by said Campbell during the second year of the operation of said plant, to wit, 1907, the appellees are in any event estopped from claiming any additional compensation by reason of damages for increased cost incurred by them in producing the ballast during the year 1907."

The doctrine of an estoppel in pais is grounded upon the principle that no man shall construct a right upon his own wrong. Whatever a man has said, or implied wrongfully to his own advantage, that he shall be bound by, when it may turn to his disadvantage, however false it may be in fact. An eminent author would state the rule thus: "When a man has made a declaration or a representation, or caused, or, in some cases not prevented, a false impression, or done some significant act, with intent that others should rely and act thereon, and upon which others have honestly relied and acted, he shall not be permitted to prove that the representation was false, or the act unauthorized or ineffectual, if injury would occur to the innocent party who has acted in full faith in its truth or validity." 2 Pars. on Contracts (9 ed.) 964. The rule is analyzed by another great master of the science of law and its essential elements thus stated: "1. There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. 2. These facts must be known to the party estopped at the time of his conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. 3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon by him. 4. The conduct must be done with the intention, or at least with the expectation that it will be acted upon by the other party, or under such circumstances that it would be natural and probable that it will be so acted upon. * * * 5. The conduct must be relied upon by the other party, and, thus, relying, he must act upon it. 6. He must in fact act upon it in such a manner as to change his position for the worse: in other words he must so act that he would suffer a loss if he were compelled to surrender, or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it. 2 Pomer. Eq. §805. For cases approving this exegesis of the doctrine of an estoppel in pais, with the exception perhaps of the fifth element as stated, see *Edwards v. Dickson*, 66 Tex. 613; *Nichols-Stewart v. Crosby*, 87 Tex. 453; *Walker v. Erwin* 106 S. W. 165.

Hence, it is said that plea of estoppel "does not admit the truth of the plaintiff's contention, but only says that whatever the real truth may be, the plaintiff or some one for whose conduct he is legally responsible has induced the defendant to believe the matters set out in the plea to be true, and has influenced him by such belief to act in such a way as to injure the defendant, if the plaintiff

should now be permitted to show the plea to be false, and that therefore in determining their respective rights such facts must be conclusively taken as true." It seems to be the rule in this state that defense of estoppel must be pleaded fully and specifically, charging by direct averment every fact necessary to constitute the estoppel relied upon. *Towns on Pleading*, 370; *G. H. & S. A. Ry. Co. v. Johnson*, 74 Tex. 663; *Bigel. on Estop.* (4 ed.) 679. Since it does not appear from the statement subjoined in appellant's brief to the first proposition advanced under this assignment that an estoppel was pleaded by the defendant we might dispose of it by

1419 failing to consider it upon ground that no such defense was made to plaintiff's action, but as the assignment of error is really aimed against the correctness of the charge we have concluded to give such consideration to the several propositions as the character and magnitude of this case may deserve.

Conceding all the matters of fact set forth in the first proposition as fully shown by the evidence we are unable, in view of the essential elements of an estoppel, to perceive how the plaintiffs can be estopped from claiming damages on account of the failure of the crushing plant to meet its warranted capacity. The warranty or guaranty did not shift from the defendant to the plaintiffs from their acceptance of it and using reasonable diligence and evidence to obtain an output of the amount of ballast they were required by their contract with defendant, which requirement and obligation on their part was predicated upon the obligation of the agreement of defendant to erect at its quarry at Tecolote a complete crushing plant, consisting of boilers, engines, crushers, elevators, screens, etc., with a maximum capacity of 1000 cubic yards in ten hours and an average capacity of 750 cubic yards in that time. As we have shown from authorities cited in considering preceding assignments, after the plant was accepted the breach of any condition to be fulfilled by the defendant could be treated by the plaintiffs as a breach of warranty, and not as a ground for rejecting the plant and treating the contract as repudiated, there being no term of the contract, express or implied, to that effect. This is a clear negation of the idea that the acceptance and use of the plant for the purpose it was furnished, though its defective capacity after its acceptance became known by actual demonstration of the fact, estopped plaintiffs from claiming damages accruing to them by reason of such defect. The obligation to furnish a crushing plant of the stipulated capacity was on the defendant, not on them. They were unaware of the plant's defective capacity when they accepted it, and only obtained knowledge of it by demonstration from its use in the work for which it was furnished. Because they had obtained such knowledge in that manner

1420 must they forfeit all the profit they would have reasonably made had the plant been of such capacity as defendant was obligated to furnish, upon the principle they are estopped from claiming them? If so, why, for what reason—what essential element of an estoppel presents itself between them and their rights and bars their asserting and maintaining them? The why, the reason, the element are all unknown and unseen by us, nor can they

be conjectured, if we know the law. Their conduct never induced the defendant to purchase the engines, crushers, etc., but such machinery had been contracted for by the defendant with the manufacturers before the contract was entered into. The contract imposed no duty to ascertain the capacity of the plant; that was warranted by the defendant when the contract was made, which warranty was incorporated into and became a part of it. That the plaintiffs paid defendant penalties assessed against them by defendant for its failure to furnish them a plant with which they could furnish the requisite quantity of ballast, while they may be estopped or precluded from recovering what they paid on such unjust demand, affords no ground of estopping such damages as they sustained by reason of the lack of the warranted capacity of the crushing plant; for defendant cannot erect a bar to plaintiffs' rights upon its own default. Nor did plaintiffs' acceptance of a part of the compensation they were entitled to preclude them from recovering whatever else that may have been due them, unless at the time such compensation was received it was understood and agreed upon, expressly or by implication, in payment of all that was due them at the time in the matter of such settlement. There never was a settlement of any damages that they may have sustained by reason of the defective capacity of the plant, save the adjustment referred to in the latter part of the paragraph of the charge above quoted.

The second proposition presents a nice question. The effect of a breach of a contract upon the rights and liabilities of the parties depends upon the nature of the agreement. If a contract is entire in the sense that each and all its parts are interdependent, so
 1421 that one part cannot be violated without violating the whole, a breach by one party of a material part will discharge the whole at the option of the other party; but if the contract is severable,—susceptible of division of apportionment,—the amount to be paid by one party depending upon the extent of performance of the other, the mere failure to perform a part of the contract in strict compliance with its terms will not of itself necessarily authorize the party injured to refuse performance. Wharton, Contr. §580; 7 Am. & Eng. Enc. Law, 2nd ed. p. 150; Johnson v. Allen, 78 Ala. 391, 56 Am. Rep. 34, Worthington v. Gwin, 119 Ala. 44, 20 So. 739. But it can make no difference whether a contract has been partially performed or the time for performance has not arrived, in determining the right of one party to regard it as abandoned by the other. Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 59, 38 N. E. 773.

As is said in Worthington v. Gwin, supra: "The circumstances attending the breach, the intention with which it was committed, and its effect on the other party and on the general object sought to be accomplished by the contract, must be considered in determining whether or not the breach will operate as a discharge. If the circumstances are such as manifest an intention on the part of the party in default to abandon the contract, or not to comply with its terms in the future, or if by reason of the breach the object sought to be effected is rendered impossible of accomplishment according

to the original design of the parties, the breach will operate as a discharge of the whole contract unless waived; but no such result follows from a mere breach of a severable contract unattended with such circumstances or such effect. The right to claim damages of the whole contract depends, not on whether the act constituting the breach was inconsistent with the terms of the contract, but whether it was inconsistent with an intention to be further bound by its terms, or whether the breach was such as to defeat the purpose of the contract." When the obligation of performance by one party presupposes the doing of some act by the other party thereto, the neglect or refusal to perform such act not only dispenses with the obligation of performance by the other, but also entitles him 1422 to rescind, or when rescission will not afford him an adequate remedy to continue the work and recover such damages as the delinquency has occasioned him. *Mansfield v. New York C. & H. Ry. Co.*, 102 N. Y. 205. See also *Goff v. Pacific Coast S. S. Co.*, 9 Wash. 386; *Aller v. Pennell*, 51 Iowa, 537; *Ward v. Kandel*, 38 Ark. 174; *Filley v. Pope*, 115 U. S. 213, 29 L. ed. 272; *Lowber v. Bangs*, 69 U. S. 728, 17 L. ed. 768.

When these principles are applied to the case under consideration, it seems to us that the obligation of the defendant to furnish the plaintiffs with a crushing plant of the capacity stipulated, while a warranty as well, was a condition precedent, the breach of which discharged the contract (*Wald's Pollock on Contracts*, supra,) and justified the plaintiffs in abandoning the performance of their part of it; and that their partial performance did not preclude them from abandoning the performance of their part of it, and recovering damages from defendant by reason of its breach of such condition. Therefore, when it became evident that defendant would not supply plaintiff with an efficient plant and suitable coal and water with which to operate it as it agreed to do, they had the right to abandon their contract. *Anvil Mining Co. v. Humble*, 153 U. S. 540, 38 L. ed., 814.

What we have said in disposing of the two foregoing propositions, likewise disposes of the third. We can perceive no reason why plaintiffs should be compelled to proceed with a contract, rendered profitless to them by defendant's breach of a condition essential to its performance by them, because they had previously undertaken to carry on the work and received payment and paid penalties, based upon reports of defendant's engineer, for what they had done. Because one has acted improvidently for a time is no reason for compelling him to act improvidently all the time so that he may lose for the benefit of another what he himself is legally entitled to gain.

4. The fifth assignment of error is as follows:

1423 "The trial court erred in the fifth paragraph of its charge to the jury in instructing them that in this case they could find for the plaintiffs damages against the defendant amounting to what the jury believed the plaintiffs would have reasonably made on the yardage of ballast not produced by them, for the reason that the plaintiffs, having abandoned said contract, could not recover such profits, and for the further reason that there was no evi-

dence before the jury that showed or tended to show that the plaintiffs could or would have made any such profits."

The assignment is presented as a proposition; it may be doubted whether, under the rules of this court, it can be so treated. Logically, it would seem to embrace two distinct propositions. However, in considering the second proposition under the preceding assignment, we have already disposed of the question as to whether one who abandons a contract can recover as damages the profits he could have made under it, by holding that, where he is warranted in abandoning it on account of a breach of a condition precedent to the performance of his part made by the other party, he can upon abandoning it for that reason recover such damages. See *Miller v. Sullivan*, 33 S. W. 702; *Joske Bros. v. Pleasants*, 15 Tex. Civ. App. 443; *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52. We will dispose of the other contention embraced in the assignments, by saying that the statement of facts before us is replete with evidence tending to show that, had defendant complied with its part of the contract regarding the capacity of the crushing plant, plaintiffs, in the performance of their part, would have made a profit equal at least to the amount awarded them by the verdict.

5. The sixth assignment, which is presented as a proposition, is: "The trial court erred in its general charge to the jury in instructing them that the duty upon the plaintiffs to minimize the damages that would occur only arose in the event the crushing plant was not of a 1,000 cubic yard capacity per ten hour day, and that it reasonably became apparent to plaintiffs that it was not of such capacity and that such failure, if any, would continue, because it was 1424 the duty of the plaintiffs in any event to minimize the damages, and, at least, it was the duty of the plaintiffs to have minimized the damages in event the coal and water furnished were not of suitable quality and it became apparent to plaintiffs that suitable coal and water would not be furnished."

When the charge is read and construed as a whole, as it should be, it will not be found obnoxious to the objection presented by the assignment. We make these excerpts from different parts of the charge:

"You are further instructed in connection with the foregoing paragraphs of this charge that where a contract is reached by one of the parties thereto, to the damage of the other, it becomes the duty of such injured party to exercise ordinary care, prudence and discretion to so conduct himself and the business pertaining to the contract as to minimize the damage which may accrue to him by reason of such breach."

"Now, if you believe from the evidence that the said crushing plant installed and furnished by the defendant to plaintiffs was not of a thousand yards maximum capacity per ten hours, as guaranteed by the defendant, if it was not, and that it reasonably became apparent to plaintiffs that it was not of the capacity guaranteed, if it was not, and that the defendant would not bring it up to the capacity, if it was not, as required by the contract and make it a plant of a thousand yards maximum capacity, and that said alleged breach, if any, would continue, then it became the duty of the plaintiff to exercise ordinary care, prudence and discretion to minimize the damage

which might reasonably accrue to them, if any, as a proximate result of such breach." Thus, we think, is the assignment refuted. Besides, we do not think had there been an entire omission in the charge of an instruction regarding plaintiffs' duty to minimize the damages, it would have been affirmative error, such as could not have been obviated by defendant's requesting a special charge on the matter. But there was no such omission; the charge as far as it went was the law, and if defendant deemed it not full enough, it could have been amplified by requesting a special charge to that end.

1425 6. The seventh assignment complains that the court erred in instructing the jury that, in the event plaintiffs ought to have closed down the plant so as to minimize damages, they could only recover such damages as would have approximately accrued to them in addition to the damages which had already accrued to them, if any, had they closed down the plant at such time, not exceeding fifteen cents per cubic yard. The ground of the complaint set forth in the proposition advanced is that it was upon the weight of evidence and prejudicial to the defendant. It is only in cases where the damages claimed by the plaintiff are so far in excess of the damages proved that the jury might be influenced by a charge limiting his recovery to the amount alleged, that it has ever been held that such limitation was prejudicial; and the cases reversed on that account have been generally, if not without exception, *ex delicto* and not *ex contractu*. But here the charge does not limit the damages which the jury might find to the amount claimed by the plaintiffs in their petition, but simply prohibits the jury from finding more than 15 cts. per cubic yard as damages they might have sustained in the event stated in the charge. This, in view of the evidence, was, we think, eminently correct and proper, since the recovery of profits as damages must necessarily be limited to such as were within the contemplation of the parties, which under the undisputed evidence could not have exceeded 15 cts. per cubic yard of ballast.

7. The eighth assignment is directed against that part of the seventh paragraph of the charge wherein the jury are instructed that, if they believe that the penalties imposed by defendant on plaintiffs under the terms of the contract were improperly imposed, and that defendant had breached its contract in the manner set forth, they would find for the plaintiffs for such part of said penalties as they believed were due to such failure. The propositions under the assignments are:

(1) "The contract under which the work was performed having expressly provided that penalties might be imposed upon the appellees for certain acts and omissions therein specified, and having committed to the Engineer of Maintenance of Way of the ap-
1426 pellant the right to and duty of determining whether or not such penalties should be imposed, and the penalties herein sought to be recovered by the appellees having been assessed by such engineer of Maintenance of Way, his action was not open to review by any court in the absence of pleading and proof of actual fraud on the part of such Engineer, and there being no such pleading or proof

in this case, the court erred in submitting to the jury the issue as to the right of the appellees to recover the penalties claimed."

(2) "The contract under which the work was performed having expressly provided that penalties might be imposed for certain acts and omissions on the part of the appellees and having provided that the Engineer of Maintenance of Way of the appellant should be the only arbiter as to whether or not such penalties should be imposed, and the penalties having been imposed by the Engineer of Maintenance of Way, any payment for the work done by the appellees under the contract having been made during each month after such penalties were deducted and balances received by the appellees without objection, the appellees should not now be heard to claim a refund on such penalties and the charge of the court permitting the jury to allow the refund was error and prejudicial to the rights of the appellant."

The right committed to defendant's Engineer of Maintenance of Way to impose penalties upon plaintiffs for the acts of omission specified in the contract was necessarily predicated upon the assumption that the defendant would so perform its part of the contract as not to cause the defaults on plaintiffs' part for which such penalties were prescribed, and that the penalties, if incurred, would be attributable to plaintiffs' own fault or failure to do that which defendant had in accordance with its part of the contract furnished them the stipulated means and instrumentalities for performing. The question of the capacity of the crushing plant, the quality and sufficiency of the coal and water to successfully operate the plant to the end it was

1427 furnished plaintiffs by defendant, were not by the contract submitted to the engineer for his decision. These matters, as we have seen, were conditions precedent to the contract which it was incumbent upon the defendant to perform in order that plaintiffs might carry out their part of the contract, and if defendant failed to perform them, and such failure proximately caused default of plaintiffs for which the penalties were assessed by the engineer, such assessments were wrong, and the amount paid by plaintiffs, if not voluntarily, are recoverable by them. It does not seem to be contended by the defendant that the payment of the penalties was voluntary on the part of plaintiffs, so we need not discuss such matter.

8. The twelfth and thirteenth assignments of error which complain of the court's refusal of special charges Nos. 4 and 11 are overruled. Our reasons for this are sufficiently stated in what has been said in considering the first, second, tenth, eleventh and sixty-second assignments of error.

9. The fourteenth assignment of error complains of the court's refusal to give the thirteenth special instruction requested by defendant, which is as follows:

"There is no evidence before you showing the amount of ballast that could have been produced by the plaintiffs herein under normal conditions and efficient management of the plant, either as it was or as plaintiffs allege it should have been, and, should you from the evidence believe that there was any difference between the plant as constructed and as agreed to be constructed in the amount of ballast that might be produced in ten hours, yet, by reason of such failure

of proof you are left without proper measure of damages herein and your verdict as to all damages claimed to be due to the lack of capacity of the plant must be in favor of the defendant."

The propositions asserted are:

(1) "The evidence before the jury that the appellees would have made any profits on the work done by them under contract, or contemplated to be done, was too vague, indefinite, uncertain and speculative to permit or justify a recovery therefor, and it was error on the part of the court not to have so instructed the jury."

1428 (2) "There was no legal evidence before the jury that the appellees would have made any profit from the work done and contemplated to be done under the contract sued on, and therefore it was error on the part of the court not to have given Instruction No. 13, by which they would have been told that they could not find against the appellant and in favor of the appellees for any such profits."

It would take more time than is at our command to recite and discuss the evidence upon the questions presented, and we must dispose of them by saying that, after reading and considering the evidence as found in the numerous pages in the statement of facts referred to by the statement subjoined to the propositions in appellant's brief, we have reached the conclusion that neither should be sustained. The probative force of such evidence was a matter for the jury to determine, it being sufficient upon the issue of loss of profits accruing to plaintiffs on account of defendant's default to require the submission of such issue. As is said in *McLane vs. Maurer*, 28 Tex. Civ. App. 75, 66 S. W. 603: "The broad general rule in such cases is that the plaintiff may recover such damages, including gains prevented as well as losses sustained, as may reasonably be supposed to have been within the contemplation of both parties at the time of making the contract as the proximate and natural consequences of a breach by the defendant; and, in determining what may reasonably be supposed to have been within the contemplation of the parties as a natural consequence of such breach, all the facts surrounding the execution of the contract known to both parties may be considered, even if these be such as would not necessarily enter into it if known by the defendant. The only question that could arise in the matter of benefits that would have accrued, had the contract not been breached, would be as to the proof." See also, *Alamo Mills Co. v. Hercules Iron Works*, 22 S. W. 1099, *Texas & W. Tel. & Tel. Co. v. McKenzie*, 81 S. W. 581; *Patterson v. Frazer*, 93 S. W. 147; *Fraser v. Mining Co.*, 9 Tex. Civ. App. 210; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 38 L. ed. 814. It was for the jury to decide the question as to the sufficiency of the proof and not the

1429 trial judge. This also disposes of the fifteenth assignment, which complains of the refusal of a similar special charge requested by defendant.

10. The sixteenth assignment assails the action of the court in refusing this special charge:

"That when a person agrees to furnish water for the operation of a steam plant, in the absence of a specific agreement to furnish water of any particular kind, the law will presume that it was the

intention of such parties that the persons so furnishing water should furnish water of the kind generally in use in that section of the country in which it was to be furnished for the purpose of operating such plant. In this connection, you are instructed that water being a natural element and of universal use, all persons will be presumed to have knowledge of the class and character of water generally prevailing in a large section of country. In this connection, you are further instructed that the contract sued on does not impose upon the defendant the furnishing of water of any particular kind or from any particular point, and, if the defendant furnished the kind of water generally in use in the section of country around Tecolote, in no way discriminating against the plaintiffs as to the kind and character of water, it has discharged its duty to the plaintiffs of the furnishing of water under the contract; and, if you should so believe, it will be your duty to find in favor of the defendant and against the plaintiffs as to all damages claimed by the plaintiffs by reason of the kind and character of the water furnished."

The substance of the first proposition under the assignment is: In the absence of any specific agreement to furnish water of any particular kind, the law presumes that it is the intention of the parties entering into a contract by which one is required to furnish water to the other for the operation of a plant, that such water is to be supplied as is generally in use in the section of the country where the water is to be furnished. This, as a general proposition, may be so; but we think it is inapplicable to the contract in this case.

1430 If there is any presumption of law as to the kind or quality of water that defendant was required by its contract to furnish plaintiffs, we think it should be of such kind and quality as was reasonably adapted and suitable to the use and accomplishment of the object and purpose for which it was to be supplied. It is obvious from the contract that the defendant knew at the time it entered into the contract that the water it thereby agreed to furnish plaintiff was to be used in the operation of the plant in generating steam for running the machinery and that it was as essential to the operation of the plant, in the generation of steam, as fuel or anything else. If, as the evidence indisputably shows, the water in the section of country around Tecolote, though generally in use for other purposes, was not adapted to, but wholly unsuitable for use in the operation of the crushing plant at that place, it was certainly not of the kind in contemplation of the parties when the contract was made; and there can be no presumption either of law or fact that it was. Therefore the question whether the water furnished plaintiffs was of a quality reasonably adapted and suitable to the use for which it was contracted by defendant to be supplied was a question of fact, not a presumption, for the jury to decide. It is manifest from the verdict, which finds reasonable support in the evidence, that the jury found it was not. Nor do we think there is any presumption, as is contended for in the second proposition, that plaintiffs contracted with reference to the kind of water generally in use in the section of country around Tecolote, or with knowledge of the character of such water, and contemplated that it was the

kind of water that should be furnished by the defendant under its contract. The evidence shows that when they made the contract they knew nothing of the quality of the water in and about that locality, and were not informed of its unsuitableness for use in operating the crushing plant, and that they had the right to rely and did rely upon the defendant's furnishing them the kind and quality of water reasonably suitable to the use for which it was to be supplied. The law is that when one party agrees to furnish means to accomplish a known purpose, there is an implied
1431 warranty that the means furnished are reasonably adapted and suited to the accomplishment of the purpose for which they were intended. *Houston Oil Co. v. Trammell*, 72 S. W. 247; *Jones v. George*, 61 Tex. 345; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, L. ed. 86.

11. The seventeenth assignment is directed against the action of the court in refusing this special charge:

"That the defendant herein is a common carrier operating a line of railway and freight and passenger trains over the said railway, between El Paso, Texas, and Tucumcari, New Mexico, and there connecting with the Rock Island Railway and at El Paso connecting with its own Western Division and with other railroads operating throughout this section of the country, and, as such common carrier, it is under the duty of moving its trains carrying freight and passengers with reasonable dispatch, which duty it cannot by contract or otherwise escape or avoid, and in this connection, you are instructed that should you believe from the testimony that the water at Ancho was of a kind better suited for generating steam than any other water found around that section of country, but the supply of the same was limited and from time to time needed for the operation of defendant's line of railway and it became necessary to use a portion of the water produced at Ancho for the operation of its trains, and that, in so doing, it was not wilfully discriminating against plaintiffs and without just cause refusing to furnish water from Ancho, then and in that event it would not be its duty to furnish such water from Ancho to the interruption of traffic over its line of railway, and any damage claimed by plaintiffs by reason of failure to furnish Ancho water, should the reason for such failure be as above stated, you will find for defendant."

The proposition asserted under the assignment is:

"The undisputed evidence showed that the appellant was at the time mentioned in the pleading and evidence a common carrier operating a line of railway transporting passengers and
1432 freight over its railroad between El Paso, Texas, and Tucumcari, New Mexico, in conjunction with connecting carriers, and as such it being the duty of appellant to move its trains carrying freight and passengers with reasonable dispatch, which duty it could not contract away or otherwise escape or avoid, if the water situated at Ancho was of a kind better suited for generating steam and the supply of the same was limited, and the same was necessary from time to time for the operation of appellant's line of railroad and was so used, and in using the same for such purpose the appel-

lant did not wilfully discriminate against the appellees, it would not be the duty of the appellant under said contract to furnish such water from Ancho so as to interrupt traffic over its line of railroad, and therefore appellees could not recover for any damages claimed by them by reason of failure to furnish Ancho water under such circumstances."

Conceding the matters of fact embodied in the proposition as true, they cannot relieve defendant of its contractual obligation to the plaintiffs which it voluntarily entered into with a full knowledge of such facts; for it is immaterial in so far as the rights of plaintiffs are concerned, what duties were imposed on the defendant by law, or what effect the discharge of its obligation to the plaintiffs would have on its ability to perform its duties to the public. If the performance of its obligation to the one would have prevented the discharge of its duty to the other, it should not have made a contract with plaintiffs which would have such effect. Having made such contract it must be held liable for the consequences of its breach, regardless of the liability its performance might have laid it under to others. That would have been its affair, not the plaintiffs'. *G. C. & S. F. Ry. Co. v. Hodge*, 30 S. W. 831; *C. G. & S. F. Ry. v. Hume*, 87 Tex. 211, 27 S. W. 110; *Yazoo & M. V. R. Co. vs. Blum* 10 L. R. A. (N. S.) 432.

12. The gravamen of plaintiffs' complaint as to the coal and water furnished by defendant is not its failure or delay 1433 in furnishing such material, but that the quality furnished was not suitable for the purpose for which it was supplied. Hence the provision of the contract that, "Should Company (defendant) fail on any working day to deliver said coal, water and cars, and such failure should result in actual delay to the Contractors' (plaintiffs') work, then the company will pay for such delay at the rate of \$15.00 per day of ten hours, "has no relation to the quality of the coal and water to be furnished but pertains only to its failure or delay in furnishing. Therefore, the court did not err in refusing to give defendant's special charge, which is the subject of the eighteenth assignment, limiting the damages to \$15.00 per day under said provision of the contract as though it were for delay.

13. Special charge No. 19, requested by defendant did not properly interpret the contract in relation to the coal and water to be furnished by the defendant, nor was there any evidence upon which a charge could be based as to the length of time it would be necessary to operate the plant with the quality of the coal and water actually furnished, nor did the special charge permit the jury to consider as an element of damages the enhanced cost to plaintiffs of operating the plant a longer period, occasioned by the defective quality of the coal and water. We think, therefore, the special charge was properly refused.

14. There was no privity of contract between the plaintiffs and the Austin Manufacturing Company in regard to the latter's undertaking to erect and construct the plant at Tecolote, although such plant was the one to be furnished by defendant to plaintiffs under its contract with them. The contract was strictly between defendant and said manufacturing company, in which plaintiffs had no voice. It

was for the defendant to see that the plant constructed by that company was of such capacity as it had under its contract with plaintiffs agreed to furnish them. Its judgment of its efficiency and capacity, not plaintiffs', was invoked. Plaintiffs had nothing to say or
 1434 do about the matter until the plant was turned over by defendants to them, and then they had the right to assume and act upon the assumption that it was such as the defendant had contracted to furnish them, and they could in no way be estopped by accepting and using it for the purpose for which it was furnished. We therefore overrule the twentieth assignment or error.

15. The acceptance of pay for ballast supplied did not estop plaintiffs suing and recovering damages for defendant's breach of its contract. *G. H. & S. A. Ry. Co. v. Johnson*, 74 Tex. 263, 11 S. W. 1113. In this connection we refer to what we have said in disposing of the fourth assignment of error. Therefore, the court did not err in refusing special charge No. 21, as is complained of by the twenty-first assignment.

16. We have anticipated and disposed of the twenty-second assignment of error in what we have said in disposing of the fourth.

17. The twenty-third assignment complains of the court's refusing to instruct the jury substantially as follows:

Even if the water furnished by appellant to appellees was not suitable for the steaming purposes without being mixed with the boiler compound mentioned in the evidence, yet if the appellant furnished such compound to the appellees for use and by the use of the same said water would have been rendered reasonably fit for steaming and boiler purposes, and if the appellees agreed with the appellant that in event it furnished such boiler compound appellees would undertake to use the same and render the water fit for use, and did accept and use said compound, then as a matter of law the appellees are not entitled to recover any additional cost which they were put to in the operation of the plant, or any additional profits which they could have made in the operation thereof subsequent to the time when the appellant furnished said compound, on account of the kind and character of water which appellant furnished.

In so far as the matters of law contained in the special charge in their application to the facts in this case are correct, they were
 1435 given in charge to the jury by the following special instruction, viz:

"At the request of the defendant you are instructed that if you believe from the evidence that the water supplied by the defendant to plaintiffs for the purpose of operating such crushing plant and for the use of plaintiffs in the operation of the quarry at Tecolote, was not of the character or quality which the court has heretofore charged the jury it was the duty of the defendant to furnish under the contract sued on in this case, but could have been reduced to such quality or character by plaintiffs at the time of using the same, by the proper use of a compound adapted to such purposes, and that the plaintiffs agreed to accept from the defendant and use such compound if furnished by defendant for such purposes, and that, thereafter, the defendant did furnish such compound to said plaintiffs for such use, then it was the obligation and duty of the plaintiffs that such compound should be used by them for such purposes, and, in event you

believe from the evidence that the plaintiffs did not so use the same or used the same in an improper manner, and that because of the failure of the plaintiffs to use the same or to use the same in a proper manner, the quality or character of the water which was actually furnished by defendant to plaintiffs for the operation of such plant remained in the condition that it was when defendant furnished the same to plaintiffs or was not reduced to the character or quality which it was originally the duty of the defendant to furnish to plaintiffs for said use, and that because thereof plaintiffs were put to any additional expense or were unable to produce the ballast which they could otherwise have produced, except for the bad quality of such water, then and in that event you will not allow plaintiffs any damages because of the quality or character of such water not being such as the defendant was obligated to furnish and supply to plaintiff, in so far as such damage, if any, was due to the failure, if any, of plaintiffs to use, or properly use such boiler compound."

1436 Upon the issues thus presented the evidence is sufficient to support a verdict for the plaintiffs.

18. We are unable to perceive upon what principle plaintiffs can be held to be estopped from ascertaining that their claim for damages on account of having had a conference with defendant on or about July, 1906, in which the lack of capacity of the crushing plant was discussed, and no damages on that account asserted or claimed by them, and defendant was induced to install and deliver to plaintiffs another crusher for their use at the plant, for which it expended value. It seems to us that conference only resulted in an acknowledgment on the part of the defendant that plaintiffs' assertion of the insufficiency of the capacity of the crusher was true, and that it endeavored to furnish another one of the capacity it had agreed in its contract to furnish in the first place. This cannot be construed as a waiver of any damages that may have accrued to plaintiffs up to that time by reason of the lack of capacity of the plant; for such damages were not the subject of the conference, contemplated by the parties nor affected by its result. The defendant neither did nor attempted to do more than it was obligated by its contract to do at first; and if plaintiffs were damaged by what it did not do but should have done, such conference, nor the result attained, was no quittance of its obligation to respond to plaintiffs in such damages as they may have sustained by defendant's breach of its contract up to that time. The essential elements of an estoppel, such as is here claimed by defendant, were absent in the transaction. We need say no more than what we have said in disposing of the fourth assignment of error. Besides, defendant did not plead that it was induced to install the No. 8 crusher by any act or promise of the plaintiffs. We have thus disposed of the twenty-third, twenty-fourth, twenty-fifth, twenty-sixth and twenty-eighth assignments.

19. The proposition of law embodied in Special Charge No. 29, the refusal of which is the subject of the twenty-seventh assignment, is embraced in the main charge, and is as clearly and advantageously, for the defendant, enunciated there as it is in the one refused. Special charge No. 36, the subject of the thirtieth assignment, is likewise covered by the main charge.

20. The questions presented by the thirty-first, thirty-second and thirty-third assignments, have already been considered and decided against defendant's contention in what we have said in disposing of previous assignments.

21. It was not contemplated by the contract that defendant's engineer as an arbiter should determine the question whether a material provision in the contract was breached by either party and assess the damages occasioned by such breach; nor were such matters submitted to or determined by such engineer. If they had been, neither party would have been bound by his award; for they were such as could only be determined by a court of competent jurisdiction. Therefore, there was no error in the court's refusing special charges Nos. 43, 45 & 47, which are the subject of the thirty-fourth, thirty-fifth and thirty-sixth assignments. Nor do we think that either of said special charges suggested any law upon the subject to which they pertain, which required the court to prepare another charge thereon and submit it to the jury.

22. The thirty-ninth assignment of error complains of the court's admitting in evidence, over the objection that it was immaterial, irrelevant and hearsay, the estimate of the cost of production of ballast at Tecolote quarry made by defendant's engineer, Campbell. These estimates were in writing and made by Campbell as defendant's agent, were itemized so as to show the several elements entering into the cost; and were made for defendant's use in determining the cost of production of the ballast and a copy of them was furnished plaintiffs prior to their bid and before the contract was signed. According to the estimates, the profits should have been 15 cts. per cubic yard on the ballast. In view of these facts, we

think the estimates were admissible to show what profits were
1438 in contemplation of the parties when the contract was made;

for in order to recover damages for a loss of profits caused by a breach of contract it is incumbent upon the plaintiff to prove that the profits lost were reasonably in the contemplation of the parties when the contract was entered into. The statement and declaration of an agent made in reference to an act which he is authorized to perform and at a time when he is conducting the business or making propositions to that end is admissible against his principal. *St. L. & S. F. R. Co. v. Watkins*, 100 S. W. 162; *M. K. & T. Ry. Co. v. Williams*, 109 S. W. 1126; *M. K. & T. Ry. Co. v. Pettit*, 117 S. W. 895; *Austin v. Nichols*, 42 Tex. Civ. App. 5, 94 S. W. 336. Therefore, we do not think the testimony was hearsay.

23. There was no error in the court's refusing to permit the witness Campbell to testify to conversations and facts leading to and inducing the supplemental contract of December 13, 1906. Such contract is free from ambiguity, no contemporaneous acts or declarations of the parties are necessary to its construction; for its obvious meaning leaves no room for that. No fraud nor mistake is sought to be shown for the purpose of avoiding or modifying it. Therefore, the contract as written must be taken to express the meaning and intention of the parties. *Milliken v. Callahan Co.*, 69 Tex. 206; *Morrison v. Hazzard*, 99 Tex. 583; *West v. Hermann*, 104 S. W. 431. It seems, however, that counsel for defendant concede that primarily the testimony was inadmissible upon the principle stated, but con-

tend that it should have been admitted because similar testimony in reference to the main contract was introduced by plaintiffs over the very objection which they urged against the admission of this. We haven't time to state and draw a distinction between the testimony referred to and that involved in this assignment; but will concede, for the purpose of disposing of the question, that plaintiffs were permitted to introduce such testimony over such objection, yet such an error would not make it lawful for the court to commit another error, though of the same kind. We, therefore, overrule the fortieth assignment.

1439 24. The forty-first assignment of error complains of the court's permitting William Eichel, one of plaintiffs, to testify that the amount of the pay-rolls covering the work done under the contract sued on was \$96,000.

The propositions under this assignment are:

(1). "In view of the fact that appellees undertook to produce ballast under the contract for appellant, and the appellant agreed to pay therefor a specific fixed amount, to-wit; 45 cents per cubic yard for the ballast so produced, the cost of the labor used in producing the same was immaterial and irrelevant to any issue in the case and the admission of testimony as to the same was harmful to appellant and therefore the court erred in permitting the witness Eichel to testify over the objections of appellant that the amount of said pay rolls was \$96,000, as shown by defendant's Bill of Exceptions No. 5 filed herein."

(2). "The plaintiff Eichel having testified that he had no knowledge as to the actual amount of the pay roll except from his examination of the same, and that while he paid the amounts due with his checks he could not remember the amounts paid except from the pay roll, and the verity of the correctness of the pay roll not being established, nor sought to be established by the testimony of any witness, and the witness Eichel testifying that he knew nothing about the amount paid for labor except as shown by said pay roll, the court erred in permitting the witness Eichel to testify to the amount shown by said pay roll and the amount paid for labor, over the objections of the appellant, because the said witness was not testifying from his own knowledge, nor testifying from any document duly verified, and said testimony was hearsay, and because there was better evidence of the fact if it was a fact."

In connection with other testimony in regard to payrolls, and how they were kept and how the money was paid out—which is too voluminous to copy in this opinion—we think it was permissible to prove by the witness how much was paid out by the plaintiffs as the costs of producing the ballast they furnished under the
1440 contract; for the real measure of the damages sustained by plaintiffs by reason of defendant's breach of the contract was the difference between what it actually cost to produce the ballast with the defective plant furnished them by defendant and what it would have cost to produce it had the plant been such as defendant, by its contract, was obligated to furnish them. If the cost was more on account of the defective plant than it would have been with such

plant as defendant should have furnished, such excess of cost was a clear loss to plaintiffs, which, if proximately caused by the defective plant, was damages they were entitled to recover. *United States v. Speed* 8 Wall. 77, 19 L. ed. 449, 2 Sutherland on Dam. 493-494, et seq.

The pay-roll was itself produced and its correctness as fully shown as it is possible to establish the correctness of documents of such character. There could have been no reason or motive at the time the pay-roll was made out and acted upon as a basis for making the numerous payments on the various items entering into the cost of producing the ballast for plaintiffs' overstating the cost of production; for it was made out for the purpose of paying out the various sums of money it showed to be due, and it is inconceivable that one would make out his pay-rolls for the purpose of charging himself with, and paying out money he did not owe. What we have said in disposing of this assignment also disposes of the fifty-fourth, fifty-fifth and fifty-sixth assignments.

25. The forty-second, forty-third, forty-fourth, forty-fifth, forty-sixth, forty-seventh, forty-eighth, forty-ninth, fiftieth, fifty-first, fifty-second and fifty-third, all complain of the admission of testimony of the witness William Eichel referred to in the several assignments. We have examined and considered the objections and various propositions set out in defendant's brief made under each of these assignments to the testimony complained of and overrule them all. We do not think it would serve any useful purpose to protract this already unusually lengthy opinion by discussing these assignments and giving our reasons for not sustaining them; for the evidence complained of in each one is such as in other cases had been repeatedly held admissible against the same or similar objections.

26. The fifty-fifth assignment complains of the court's permitting plaintiffs to introduce in evidence the daily time-checks as evidence of payments for the work done in producing the ballast, the objections being that they were immaterial, irrelevant and hearsay. We think that such evidence was proper, in connection with the pay-rolls of plaintiffs, in that it showed items of costs in producing the ballast, which served as a basis for estimating plaintiffs' damages in showing a loss of profits occasioned them by defendant's furnishing them a plant of less capacity than it was bound by their contract to do. See what we have said in considering the forty-first assignment, and the authorities cited, for our reasons for overruling this one.

27. We think that the witness sufficiently identified and showed the correctness of the time sheets, and that his testimony was competent and admissible for that purpose. This disposes of the fifty-seventh assignment.

28. The court did not err in overruling defendant's general demurrer to plaintiffs' first amended original petition. The plaintiffs having alleged as a basis of their right of recovery a breach of contract by defendant incapacitating them from performing their part of it, upon which they predicated the damages sued for, it was not

essential for them to allege the issuance of a certificate of the defendant's engineer that the contract was completed, as a condition precedent to their institution of their suit for the damages they sustained by reason of defendant's breach of the contract. *Linch. v. Paris L. & G. E. Co.* 80 Tex. 23, 15 S. W. 208. Besides, we do not think the question of the sufficiency of the petition in that regard could be raised by a general demurrer. See *Ins. Co. v. Woodward*, 45 S. W. 185; *Inter'l Harv. Co. v. Campbell*, 96 S. W. 1442 93; *Ins. Co. v. Hargus*, 99 S. W. 580; *Teleg. Co. v. Levy*, 102 S. W. 134. We, therefore, overrule the fifty-eighth assignment. We likewise dispose of the fifty-ninth, sixtieth, sixty-first and sixty-second assignments which complain of the court's overruling certain special exceptions respectively mentioned in the several assignments of error stated.

There is no error assigned requiring a reversal of the judgment, save the third, by reason of which plaintiffs may have recovered \$513.00 more than they were entitled to; this error, as before stated, may be obviated by a remittitur of that amount. Therefore, if the plaintiffs will enter a remittitur of that sum in this court on or before the 30th of this month, the judgment will be affirmed, otherwise it will be reversed and the cause remanded.

H. H. NEILL.

Associate Justice.

Endorsed: No. 4329. In Court of Civil Appeals Fourth Supreme Judicial District of Texas, San Antonio. *El Paso & Southwestern Railroad Co.*, Appellant, vs. *Eichel & Weikel*, Appellees. From *El Paso County*. Opinion by H. H. Neill, Associate Justice. Filed in the Court of Civil Appeals at San Antonio, Texas, Jun. 22, 1910, *Jos. Murray*, Clerk. Filed in Supreme Court Nov. 1, 1910, *F. T. Connerly*, Clerk.

Remittitur by Appellees (Plaintiffs.)

In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting at San Antonio, Texas

No. 4329.

EL PASO & SOUTHWESTERN RAILROAD CO., Appellant,

vs.

EICHEL & WEIKEL, Appellees.

Now come William Eichel and Adam Weikel, composing the firm of Eichel & Weikel, plaintiffs in the trial Court and Appellees in this Court in the above styled and numbered cause, and do hereby offer to remit and do hereby remit the sum of Five Hundred and Thirteen, (\$513.00) Dollars as of the date of the original judgment rendered herein the District Court of the 41st. Judicial District in El Paso County, to wit the 20th. day of April, A. D. 1909, and in accordance with the suggestion, order,

opinion and judgment of this Court rendered on the 22nd. day of June, A. D. 1910, adjudging that the plaintiffs, Eichel & Weikel, composing said firm of Eichel and Weikel will enter a remittitur of the above named sum in this Court on or before the 30th day of June, A. D. 1910, that the judgment herein will be affirmed, and said plaintiffs do now here enter such remittitur accordingly, and they ask that such remittitur be entered of record in this Honorable Court and that the judgment as so corrected be affirmed.

Respectfully submitted and filed.

EICHEL & WEIKEL,
WM. EICHEL AND
ADAM WEIKEL.

By RICHARD F. BURGESS &
DAVIS & GOGGIN,

Their Attorneys of Record.

(Filed in the Court of Civil Appeals, at San Antonio, Texas, June 27, 1910.)

Judgment.

(June 27, A. D. 1910.)

No. 4329.

EL PASO & S. W. R. R. Co., Appellant.

vs.

EICHEL & WEIKEL, Appellees.

Appeal from District Court, El Paso County.

This cause came on to be heard on the transcript of the record and the same being inspected, and the Court having on June 22nd, 1910 in open court announced that the judgment of the court below would be affirmed, provided the appellees filed in this court a remittitur of Five Hundred and Thirteen (\$513.00) dollars of the judgment of the court below on or before the 30th day of 1444 June 1910, and the appellees having been duly notified of such announcement, and with the permission of and on said indication of the court having on June 27th, 1910, filed the said remittitur so required by the court; it is therefore considered, adjudged and ordered that said remittitur be allowed, and because the court is of the opinion that there was no other error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below in favor of appellees as reduced by said remittitur be affirmed; that the appellees William Eichel and Adam Weikel composing the firm of Eichel & Weikel do have and recover of and from the appellant El Paso & Southwestern Railroad Company and its sureties Joshua S. Reynolds and J. M. Reynolds, the amount adjudged by the court below, to-wit: Thirty four thousand one hundred and ninety six and 45/100 (34196.45) Dollars,

less said sum of Five hundred thirteen (\$513.00) Dollars remitted by appellees, said sum to be deducted from the amount of the judgment of the court below as of the date of said judgment, thereby reducing said sum to Thirty three thousand six hundred eighty three and 45/100 (\$33683.45) Dollars, together with interest thereon from the 20th day of April 1909, the date of the judgment of the court below, at the rate of six (6%) per cent. per annum.

It is further ordered that appellant El Paso & Southwestern Railroad Company and its sureties, Joshua S. Raynolds and J. M. Raynolds, pay all costs of the court below, and that appellees Eichel & Weikel pay all costs of this appeal, and this decision be certified below for observance.

1445

Motion for Rehearing.

In the Court of Civil Appeals of the Fourth Supreme Judicial District of the State of Texas, Sitting at San Antonio, Texas.

No. 4329.

EL PASO & SOUTHWESTERN RAILROAD COMPANY, Appellant,
vs.

EICHEL & WEIKEL, Appellees.

Appeal from El Paso County.

Motion for Re-hearing.

To the Honorable Court of Civil Appeals:—

Now comes Appellant, the El Paso and Southwestern Railroad Company, and moves the Court to set aside the judgment entered herein on the 22nd day of June, 1910, affirming the judgment of the District Court of El Paso County, Texas, upon the condition that the Appellees file a remittitur of \$513. on or before the 30th day of July, 1910; the appellees having filed such remittitur heretofore, to-wit: on or about the 28th day of June, 1910, whereby, and in accordance with the said order the said judgment stands affirmed, and for reasons why the judgment of affirmance should be set aside, rehearing granted and the judgment of the District Court of El Paso County, Texas, 41st Judicial District, reversed this Appellant says:

First.

This Honorable Court erred in that part of its opinion, and in the decision based thereon, overruling the Appellant's First, Second, Tenth and Sixty-Second assignment of errors, appearing on pages 26 to 33 inclusive of the opinion of the Court, for the reason that by the terms of the contract entered into between Appellant and Appellees, and out of which this suit has arisen, the capacity of the plant furnished by Appellant to the Appellees to do the work was

not warranted, and the terms held by the Court to be terms of warranty were not intended to be, and were not such, but were merely terms descriptive of the plant to be furnished by Appellant to Appellees, and in fact furnished by Appellant to Appellees. The

1446 attention of the Court is respectfully called to the fact that by the terms of the contract, the Appellees agreed to, that they would provide whatever additional equipment, other than that specifically named and furnished, that might be found necessary to secure and maintain an average daily output of 750 cubic yards of ballast per working day without expense to the Company (Appellant). (See the contract as copied on page 14 of the opinion of the Court, and the clause above quoted will be found on page 22 of Appellant's brief.) We respectfully submit that the entire context of the contract shows conclusively that it was not the purpose of the company to warrant the capacity of the plant, and especially the clause above quoted recognizes that it might not be sufficient to produce and maintain an average daily output of 750 cubic yards, and that in the event it was found inadequate, the equipment necessary to bring it up to the standard necessary to produce the average of 750 cubic yards rested upon the Appellees. This provision is absolutely and unreconcilably inconsistent with a warranty of capacity. As we read the opinion of the Court this part of the contract does not receive the weight that it is in fact entitled to, and we think and urge upon the court that by giving it that weight that it is entitled to the conclusion cannot be reached that the capacity was warranted by Appellants.

Second.

The court erred in that part of its opinion, and in the judgment rendered thereon, wherein it overruled the 4th Assignment of error, being pages 35 to 42 inclusive, of the opinion of the Court. The Appellees had no legal right to enter into the possession of the property, and fail to carry out the duty resting upon them under the terms of the contract without putting in such additional equipment over and above that specifically named by the Appellant, and which was necessary to bring the capacity of the plant to 750 cubic yards, an average daily output of ten hours, if any equipment was necessary to bring it to that capacity, to remain in possession of the plant, to operate it without adding thereto additional equipment, to receive 1447 without protest what was earned by them in the operation of its plant under the contract, and then voluntarily and of their own accord, terminate the contract and maintain a suit for a sum additional to what they had received under the contract.

Third.

The Court erred in paragraph sixth of its opinion, and in the judgment rendered thereon, in holding that it was not error for the trial Court to mention in the charge the maximum amount that plaintiffs could recover, and especially in holding that the profits, as damages, must necessarily be limited to such as were within the contemplation of the parties, which, under the undisputed evidence, could not have exceeded fifteen cents per cubic yard of ballast for the

reason that the amount the parties expected the contractors to make could not fix the amount of their recovery; if they thought they were going to make fifteen cents, but it was actually conducted *for* they may have made thirty they would have a right to it; if they expected them to make fifteen, but conducted it so they could not make but one, they were entitled to no more.

Fourth.

The Court erred in the seventh paragraph of the opinion, and the judgment rendered thereon, wherein it holds that the penalties imposed by the Appellant on Appellees could be recovered, for the reason that the right to impose those penalties, and the ascertainment of the facts which justified the imposition of the penalties, was by the express agreement of the parties, under the terms of the contract, given to the engineer of Maintenance and Way of the Appellant, and therefore in the absence of allegations and proof of fraud in imposing the penalty, the judgment cannot be gone beyond. So much of the charge of the Court that permitted a recovery of the penalties, and left the jury to determine whether or not the penalties
1448 were improperly imposed, and so much of the opinion of this Honorable Court that upholds that portion of the charge, is erroneous.

Fifth.

The Court erred in those portions of the opinion of the Court which hold that any duty rested upon the Appellant in this case to furnish any other kind of water than that generally prevailing in the territory and neighborhood in which the work was to be done, and any recovery of damages predicated upon the diminished capacity due to the fact the water furnished was of a kind other than the Appellees would like to have had, and of a kind that would in fact facilitate the operation of the plant, is erroneous.

Sixth.

The Court erred in the twelfth paragraph of its opinion in holding that the agreed penalties, or that the agreed and stipulated damages of Fifteen Dollars a day, did not apply where water was furnished, but was not of a kind best suited for the operation of the plant. Both clauses of the contract, the one providing that the Appellant was to furnish the water, and the one providing for the stipulated damages of Fifteen Dollars a day for failure to furnish water, are in the same language; they refer to the same kind of water, and it is improper to so construe the contract as to give the language one meaning in one clause of the contract, and another in another clause of the contract, when there is nothing in the opinion to justify the difference of meaning attributed to the language, and we respectfully submit that there is not.

Seventh.

The Court erred in that part of its opinion wherein it upheld the admissibility of the bi-monthly and daily pay rolls; they were not

proved on the oath of anyone who made them; they are not papers made by the Appellant or with the making of which it had anything to do; they are not papers ever shown to have been in its possession, or over which it had any control; they are papers, as shown
1449 by the evidence, made by some one presumably in the employ of the Appellees; no living man testified to the truth of the pay rolls. The witness, Miller, had to admit that there were days on which he was not present; if they were not proved in full they were not proved at all, because there is no evidence before the Court of the days that Miller knew them to be right, and no testimony of the days on which he was not there and any presumption as to their identity existed. Under this express admission in reference to these pay-rolls, any evidence was prejudicial error. It is not answer to say that they were as well proven as they could be; many cases fail because there is no evidence to sustain them. We cannot escape the conclusion in this case that the judgment is rendered against Appellant, based upon testimony, which, in itself, upon the most vital issue in the case, and which was an issue of fact, rested upon papers, the truth of which no one testified to. If the pay rolls were inadmissible, then the Appellee's, Eichel's, testimony as to the payments made by him upon them was immaterial, irrelevant and improperly admitted. His testimony as to the amount of the payments was only admissible as one means of showing what expense he had been put to. If, as a matter of fact, he had not properly under the contract, incurred those expenses, or if in fact they were not necessarily incurred in the conduct of the work, he would not have been entitled to introduce them, nor testify as to them, and the testimony so admitted was prejudicial.

Eighth.

The court erred in refusing and failing to sustain Appellant's First Assignment of Errors, which is as follows:

"The trial court erred in its general charge to the jury in charging the jury, in effect, that the defendant guaranteed that the rock crushing plant furnished to the plaintiffs by the defendant had a maximum capacity of 1,000 cubic yards per ten hour day, the undisputed evidence showing that the defendant did not guarantee that said rock crushing plant had that or any other capacity whatsoever."

1450 as the same appears on page 42 of Appellant's brief, and for the reasons therein set forth.

Ninth.

The Court erred in failing and refusing to sustain Appellant's Second assignment of Errors, which is as follows:

"The trial court erred in the third paragraph of its general charge to the jury in instructing the jury that, under the written contract sued on and in evidence before them, the defendant agreed to erect at its quarry at Tecolote, New Mexico, a complete crushing plant, consisting of boilers, engines, crushers, elevators, screens, ballast bins, etc., with a maximum capacity at said quarry of 1,000 cubic

yards in ten hours, and with an average capacity of 750 cubic yards in ten hours, broken in the crushers to the maximum sizes that will pass through a three inch ring, together with two No. 3½ steam drills, one steam boiler with steam pipe and steam hose for drilling the quarry, and one small Duplex pump with pipe connections for water supply, the undisputed evidence showing that the defendant did not make any such guarantee, nor agree under said written contract that the said crushing plant would have any particular capacity, and, in all events, there was no agreement on the part of the defendant that the said crushing plant would have an average capacity of 750 cubic yards in ten hours, broken to the size that would pass through a three inch ring."

Appearing on page 46 of Appellant's brief.

Tenth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Second Assignment of Error, which is as follows:

"The court erred in instructing the jury that the defendant (appellant) by the terms of its written contract agreed to erect a complete crushing plant as therein described with a maximum capacity of 1000 cubic yards in ten hours and with an average capacity of 750 cubic yards in ten hours, and the auxiliary machinery as therein described, for the reason that the defendant (appellant) did not agree to erect a plant of any given capacity, nor did it guarantee nor warrant the capacity of the plant as erected, but the said written contract described the plant to be erected, and the court in charging the jury as herein recited, failed to properly construe the said contract to defendant's injury in that the said defendant did not guarantee or warrant the capacity of the plant"

As it appears on page 47 of Appellant's brief, and for the reasons therein in that connection stated.

Eleventh.

The court erred in failing and refusing to sustain Appellant's Second Proposition under its Second Assignment of Error, which is as follows:

"The guarantee, if any there was, and contract between the appellant and appellees upon which this suit is based, having been reduced to writing and not containing any guarantee or agreement on the part of the appellant that the plant delivered to appellees should have an average capacity of 750 cubic yards per day, it was error on the part of the court to have instructed the jury that the appellant guaranteed or agreed that said plant did have an average capacity of 750 cubic yards per day."

As it appears on page 49 of Appellant's brief, and for the reasons therein in that connection stated.

Twelfth.

The Court erred in failing and refusing to sustain Appellant's Fourth Assignment of Error, which is as follows:

"The trial court erred in instructing the jury that they could find against the defendant the difference between the reasonable actual cost to the plaintiffs of all ballast actually produced, except that produced from October 1st to November 7th, 1906, inclusive, and what they believed from the evidence it would have reasonably cost them to produce the same, had the said plant had a maximum
1452 capacity at said quarry of 1,000 cubic yards in ten hours and had the coal and water furnished by the defendant been of a quality reasonably sufficient and suitable for the production of steam for the operation of said plant for the reason that the plaintiffs have been paid under said contract at the rate therein provided for the ballast actually produced and have received said payments from time to time, and so are estopped from claiming any further amounts, and for the further reason that said plaintiffs, having alleged and proven that they abandoned and threw up said contract, could not recover for such additional costs, and for the further reason that in that portion of said charge the court committed affirmative error in not instructing the jury that they could only find for such damages against the defendant in event the plaintiffs had used reasonable diligence in minimizing the damages, if any, and loss, if any, suffered by the plaintiffs, and that part of said charge is contradictory of and irreconcilable with the other portions of the charge in which the court instructs the jury that it was the duty of the plaintiff- to minimize the damages, if any."

As it appears on page 52 of Appellant's brief, and for the reasons therein in that connection stated.

Thirteenth.

The court erred in failing and refusing to sustain Appellant's First Proposition under its Fourth Assignment of Error, which is as follows:

"The appellant and appellees having entered into a contract by which for an adequate consideration the appellees agreed to supply appellant with crushed stone at a price agreed on, and having accepted from appellant the plant erected for that purpose and having operated the said plant and received for its output the contract price, and without protest, appellees should be and are estopped from claiming any additional compensation by way of damages for increased cost incurred by them in producing the ballast as over and above
1453 the price at which it might have been produced under different circumstances."

As it appears on page 56 of Appellant's brief, and for the reasons therein in that connection stated.

Fourteenth.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Fourth Assignment of Error, which is as follows:

"The appellees having abandoned their contract and declined to carry out the same, were not in a position lawfully to demand of the appellant the profit they would have made upon the performance of the work not in fact performed and the completion of which they had abandoned."

As it appears on page 56 of Appellant's brief, and for the reasons therein in that connection stated.

Fifteenth.

The Court erred in failing and refusing to sustain Appellant's Third proposition under its Fourth Assignment of Error, which is as follows:

"The appellant and appellees having entered into the contract sued on by which appellees agree to supply appellant with crushed stone at the price agreed on, and having accepted from appellant the plant erected for that purposes and operated the said plant and received for its output the contract price without protest, and having agreed to the correctness of the reports made by Harrison to the Chief Engineer and upon which such payments were based, and from which penalties and royalties were determined and allowed by said Campbell during the second year of the operation of said plant, to-wit, 1907, the appellees are in any event estopped from claiming any additional compensation by reason of damages for increased cost incurred by them in producing the ballast during the year 1907."

As it appears on page 59 of Appellant's brief, and for the reasons therein in that connection stated.

1454

Sixteenth.

The Court erred in failing and refusing to sustain Appellant's Fifth Assignment of Error, which is as follows:

"The trial Court erred in the fifth paragraph of its charge to the jury in instructing them that in this case they could find for the plaintiffs damages against the defendant amounting to what the jury believed the plaintiffs would have reasonably made on the yardage of ballast not produced by them, for the reason that the plaintiffs, having abandoned said contract, could not recover such profits and for the further reason that there was no evidence before the jury that showed or tended to show that the plaintiffs could or would have made any such profits."

As it appears on page 59 of Appellant's brief, and for the reasons therein in that connection stated.

omissions on the part of the appellees and having provided that the Engineer of Maintenance of Way of the appellant should be the only arbiter as to whether or not such penalties should be imposed, and the penalties having been imposed by the Engineer of Maintenance of Way, and payment for the work done by the appellees under the contract having been made during each month after such penalties were deducted and balance received by the appellees without objection, the appellees should not now be heard to claim a refund on such penalties and the charge of the court permitting the jury to allow the refund was error and prejudicial to the rights of the appellant."

As it appears on page 69 of Appellant's brief, and for the reasons therein and in that connection stated.

Twenty-third.

The Court erred in failing and refusing to sustain Appellant's Ninth Assignment of error, which is as follows:—

"The trial court erred in the eighth paragraph of its general charge to the jury in instructing the jury that the plaintiffs could recover for freight charges made against the plaintiffs by the defendant for goods, wares and merchandise transported over the defendant's lines, for the reason that the contract between the defendant and the plaintiffs was reduced to writing and there was no agreement therein contained to the effect that the defendant would transport any such goods, wares and merchandise free of cost."

As it appears on page 70 of Appellant's brief, and for the reasons therein and in that connection stated.

Twenty-fourth.

1458 The Court erred in failing and refusing to sustain Appellant's Tenth Assignment of Error, which is as follows:—

"The trial court erred in refusing to give Special Instruction No. 2 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury or in any charge given by it as to the rule of law stated in said Special Instruction."

As it appears on page 72 of Appellant's Brief, and for the reasons therein and in that connection stated.

Twenty-fifth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Tenth Assignment of Error, which is as follows:—

"In the written contract sued on, there being no warranty as to the capacity of the crushing plant, engines and boilers delivered by the appellant to the appellees but said plant, engines and boilers being specifically described in said contract, the words used in said

contract describing said plant as capable of crushing 1000 yards of ballast in ten hours were words of description and not of warranty, and it was therefore error on the part of the court not to have given Special Instruction No. 2 so construing said contract."

As it appears on page 72 of Appellant's Brief, and for the reasons therein and in that connection stated.

Twenty-sixth.

The court erred in failing and refusing to sustain Appellant's Eleventh Assignment of Error, which is as follows:—

"The trial court erred in refusing to give Special Instruction No. 3 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge 1459 the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 75 of Appellant's Brief, and for the reasons therein and in that connection stated.

Twenty-seventh.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Eleventh Assignment of Error, which is as follows:—

"The contract between the appellees and appellant was reduced to writing and there is no warranty contained in the same as to the capacity of the plant therein described and which appellant turned over to appellees, and the words used in said contract describing the plant as one capable of crushing 1000 yards of ballast in ten hours were words of description and not of warranty, and therefore it was error in the court not to have given Special Instruction No. 3, thereby instructing the jury as to the proper construction of said written contract."

As it appears on page 75 of Appellant's Brief, and for the reasons therein and in that connection stated.

Twenty-eighth.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Eleventh Assignment of Error, which is as follows:—

"Under the terms of the written contract sued on the appellees, obligated themselves to install at their own cost and expense all such additional equipment to the plant delivered to them as might be found necessary to secure and maintain an average daily output of 750 cubic yards for each working day, the appellant being obligated only to deliver the plant described in the contract, which the undisputed evidence shows it did, therefore it was error on the part of the court not to have instructed the jury that such was the legal effect of said written contract."

1460 As it appears on page 76 of Appellant's Brief, and for the reasons therein and in that connection stated.

Twenty-ninth.

The Court erred in failing and refusing to sustain Appellant's Twelfth Assignment of Error, which is as follows:—

"The trial court erred in refusing to give Special Instruction No. 4 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to charge the jury in its general charge to the jury or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 78 of Appellant's Brief, and for the reasons therein and in that connection stated.

Thirtieth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Twelfth Assignment of Error, which is as follows:—

"The evidence shows that the appellees before entering into the contract sued on were fully advised as to what the plant which would be delivered to them by the appellant in event they did enter into said contract would consist of, and were given an opportunity to and did examine the same and acquainted themselves with its character and capacity, and tended to show that they were experienced in the business of crushing rock, and for such reason appellees were not entitled to recover for any defect, if any there was, in the character or capacity of the said plant then known to them, or which they could have discovered by an examination thereof, and the court therefore erred in not so instructing the jury by giving Special Charge No. 4 asked by appellant."

As it appears on page 78 of Appellant's Brief, and for the reasons therein and in that connection stated.

Thirty-first.

1461 The Court erred in failing and refusing to sustain Appellant's Thirteenth Assignment of Error, which is as follows:—

"The trial court erred in refusing to give Special Instruction No. 11 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the law stated in said Special Instruction."

As it appears on page 80 of Appellant's Brief, and for the reasons therein and in that connection stated.

Thirty-second.

The court erred in failing and refusing to sustain Appellant's First Proposition under its Thirteenth Assignment of Error, which is as follows:—

"The evidence shows that prior to the time when the appellees entered into the contract sued on, William Eichel, one of the appellees, acting for them in person and through his agent Igert, an expert crushing man, was given by appellant an opportunity to examine the plans and specifications of the crushing plant actually delivered under the contract to appellees by appellant and that said plans and specifications indicated the character and capacity of the plant to be furnished to them and that they had a reasonable opportunity to examine the machinery to be furnished by appellant to them under said contract, and that by reason of such examination they did in fact become acquainted and ascertain the character and capacity of said plant, and there *there* afterwards they entered into the said contract and undertook the performance of the duties involving upon them by the same, and they are therefore estopped from now claiming any damages against the appellant for or by reason of any insufficiency or lack of capacity of said plant complained of in the petition, and the court should have so instructed the jury by giving Special Instruction No. 11."

As it appears on page 81 of Appellant's Brief, and for the reasons therein and in that connection stated.

1462

Thirty-third.

The Court erred in failing and refusing to sustain Appellant's Fourteenth Assignment of Error, which is as follows:

"The trial court erred in refusing to give Special Instruction No. 13 asked by the defendant, for the reason that the same property stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of the law stated in said Special Instruction."

As it appears on page 85 of Appellant's Brief, and for the reasons therein and in that connection stated.

Thirty-fourth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Fourteenth Assignment of Error, which is as follows:—

"The evidence before the jury that the appellees would have made any profits on the work done by them under contract, or contemplated to be done, was too vague, indefinite, uncertain and speculative to permit or justify a recovery therefor, and it was error on the part of the court not to have so instructed the jury."

As it appears on page 86 of Appellant's brief, and for the reasons therein and in that connection stated.

Thirty-fifth.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Fourteenth Assignment of Error, which is as follows:—

"There was no legal evidence before the jury that the appellees would have made any profit from the work done and contemplated to be done under the contract sued on, and therefore it was error on the part of the court not to have given Instruction No. 13, by which they would have been told that they could not find against the appellant and in favor of the appellees for any such profits."

1463 As it appears on page 87 of Appellant's Brief, and for the reasons therein and in that connection stated.

Thirty-sixth.

The Court erred in failing and refusing to sustain Appellant's Fifteenth Assignment of Error, which is as follows:—

"The trial court erred in refusing to give Special Instruction No. 14 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 88 of Appellant's brief, and for the reasons therein and in that connection stated.

Thirty-seventh.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Fifteenth Assignment of Error, which is as follows:—

"There was not before the jury any evidence showing the amount of ballast that could have been produced by the appellees under normal conditions and efficient management of the plant delivered by the appellant to the appellees, and there was no proper measure of damages as to any lack of capacity of the plant, and the court should have so told the jury by giving said Special Instruction No. 14."

As it appears on page 88 of Appellant's brief, and for the reasons therein and in that connection stated.

Thirty-eighth.

The Court erred in failing and refusing to sustain Appellant's Sixteenth Assignment of Error, which is as follows:—

"The trial court erred in refusing to give Special Instruction No. 16 asked by the defendant, for the reason that the same properly

1464 stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 89 of Appellant's Brief, and for the reasons therein and in that connection stated.

Thirty-ninth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Sixteenth Assignment of Error, which is as follows:

"In the absence of any specific agreement to furnish water of a particular kind, the law presumes that it is the intention of the parties entering into a contract by which one is required to furnish water to the other for the operation of a plant, that it means water generally in use in the section of country in which the same is to be furnished for the operation of such plant, and the court erred in not so advising the jury by giving Special Instruction No. 16."

As it appears on page 90 of Appellant's Brief, and for the reasons therein and in that connection stated.

Fortieth.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Sixteenth Assignment of Error, which is as follows:

"Water being a natural element and of universal use, where both parties to a contract such as the one sued on by which one agrees to furnish it to the other are present in the section of country from which the water is to be taken, they are both presumed to have knowledge of the class and character of water generally prevailing in such section of country, and therefore to contract with reference to such fact, and it was error in the court to not so advise the jury by giving Special Instruction No. 16."

1465 As it appears on page 92 of Appellant's Brief, and for the reasons therein and in that connection stated.

Forty-first.

The Court erred in failing and refusing to sustain Appellant's Third Proposition under its Sixteenth Assignment of Error, which is as follows:

The Contract sued on does not impose upon the appellant the duty of furnishing water of any particular kind or from any particular point, and if the appellant furnished the kind of water generally in use in the section of country around Tecolote, the point where said plant was being operated, in no way discriminating against the appellees as to the kind and character of water, it discharged its duty to the appellees in so far as furnishing water under the contract is

concerned, and the court erred in not so advising the jury by giving said Special Instruction No. 12."

As it appears on page 93 of Appellant's Brief, and for the reasons therein and in that connection stated.

Forty-second.

The Court erred in failing and refusing to sustain Appellant's Seventeenth Assignment of Error, which is as follows:

"The trial Court erred in refusing to give Special Instruction No. 17 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 99 of Appellant's brief, and for the reasons therein and in that connection stated.

Forty-third.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Seventeenth Assignment of Error, which is as follows:

1466 "The undisputed evidence showed that the appellant was at the time mentioned in the pleading and evidence a common carrier operating a line of railway transporting passengers and freight over its railroad between El Paso, Texas, and Tucumcari, New Mexico, in conjunction with connecting carriers, and as such it being the duty of the appellant to move its trains carrying freight and passengers with reasonable dispatch, which duty it could not contract away or otherwise escape or avoid, if the water situated at Ancho was of a kind better suited for generating steam and the supply of the same was limited, and the same was necessary from time to time for the operation of appellant's line of railroad and was so used, and in using the same for such purpose the appellant did not wilfully discriminate against the appellees, it would not be the duty of the appellant under said contract to furnish such water from Ancho so as to interrupt traffic over its line of railroad, and therefore appellees could not recover for any damages claimed by them by reason of failure to furnish Ancho water under such circumstances."

As it appears on page 99 of Appellant's Brief, and for the reasons therein and in that connection stated.

Forty-fourth.

The court erred in failing and refusing to sustain Appellant's Eighteenth Assignment of Error, which is as follows:

"The trial court erred in refusing to give Special Instruction No. 18 asked by the defendant for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the

jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 102 of Appellant's Brief, and for the reasons therein and in that connection stated.

Forty-fifth.

1467 The Court erred in failing and refusing to sustain Appellant's First Proposition under its Eighteenth Assignment of Error, which is as follows:

"The contract sued on in this case expressly providing in effect that in event the appellant failed to furnish water to operate said plant, that the appellees should be entitled to \$15.00 a day of ten hours, or \$1.50 per hour, for any delays occasioned thereby, appellees' measure of damages was thereby fixed and they would not recover any amount exceeding said sum of \$15.00 per day of ten hours, or \$1.50 per hour, for delay, and it was error on the part of the court not to have so instructed the jury by giving Special Instruction No. 18."

Forty-sixth.

The Court erred in failing and refusing to sustain Appellant's Nineteenth Assignment of Error, which is as follows:

"The trial court erred in refusing to give Special Instruction No. 19 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 105 of Appellant's brief, and for the reasons therein and in that connection stated.

Forty-seventh.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Nineteenth Assignment of Error, which is as follows:

"The court not having in any charge given to the jury defined the meaning of the word "Delay" as used in the contract sued on. it was error on the part of the court not to have given Special Instruction No. 19, which would have properly defined to the jury the meaning of the word as used in said contract."

As it appears on page 105, of Appellant's brief, and for the reasons therein and in that connection stated.

1468

Forty-eighth.

The Court erred in failing and refusing to sustain Appellant's Twentieth Assignment of Error, which is as follows:

"The trial court erred in refusing to give Special Instruction No. 20 asked by the defendant, for the reason that the same properly

stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 107 of Appellant's Brief, and for the reasons therein and in that connection stated."

Forty-ninth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Twentieth Assignment of Error, which is as follows:

The evidence shows that the appellant had contracted with the Austin Manufacturing Co. to construct and erect the plant at Tecolote which the appellant contracted to turn over to the appellees, and of the capacity mentioned in the contract sued on, and that said appellant had the right under the contract with said Manufacturing Company to refuse to accept the same unless it was in accordance with said agreement, and the evidence tends to show that the appellees, knowing such facts and to induce appellant to accept same, did assure the appellant after an examination of said plant that it was acceptable to them and was in fulfillment of the contract sued on, and if such are the facts appellees are now estopped from complaining that said plant was not in accordance with such contract, or that the capacity of the same was in any wise insufficient, or from seeking to recover damages by reason of any such alleged insufficiency, and the court erred in not so instructing the jury by giving said Special Instruction No. 20."

As it appears on page 107 of Appellant's Brief, and for the reasons therein and in that connection stated.

1469

Fifty.

The Court erred in failing and refusing to sustain Appellant's Twenty-First Assignment of Error, which is as follows:

"The trial court erred in refusing to give Special Instruction No. 21 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 110 of Appellant's brief, and for the reasons therein and in that connection stated."

Fifty-first.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Twenty-First Assignment of Error, which is as follows:

"The undisputed evidence shows that appellees from month to month accepted the monthly estimates of work performed by them

under the contract sued on, which fixed the amount of their compensation for work done upon the basis of the amount of the daily output, and receipted for the same and continued so to do during the entire period of operation under the contract without protest with reference to the amount or rate of such compensation, and without notifying the appellant that they ever expected to claim any additional compensation for the work done by them and ballast furnished, or without making to appellant, or its agent, any claim for damages by reason of any alleged failure of appellant to perform its contract, and therefore appellees are not now in a position to assert a right to recover any additional compensation for the ballast so produced by them, or damages for any additional cost to them of producing said ballast, payment for which was so made to and accepted by them at said contract price, or payment for any services rendered or ballast furnished at any other than the contract rate so received by them upon the basis of their monthly estimate, the court should so have instructed the jury by giving said Special Charge No. 21." As it appears on page 110 of Appellant's Brief, and for the reasons therein and in that connection stated."

Fifty-second.

The Court erred in failing and refusing to sustain Appellant's Twenty Second Assignment of Error, which is as follows:

"The trial Court erred in refusing to give Special Instruction No. 22 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 112 of Appellant's Brief, and for the reasons therein and in that connection stated.

Fifty-third.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Twenty-Second Assignment of Error, which is as follows:

"Even though the plant mentioned in the contract sued on did not have the capacity called for thereby, yet the appellees after having discovered that fact could not continue to operate said plant and claim damages against the appellant sustained by reason of the incapacity of said plant after they had made such discovery, and the court should have so instructed the jury and have given defendant's Special Charge No. 22."

As it appears on page 113 of Appellant's Brief, and for the reasons therein and in that connection stated.

Fifty-fourth.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Twenty-Second Assignment of Error, which is as follows:

"The evidence shows that the evidence and claim of the appellees is to the effect that they became aware of the lack of capacity of the plant mentioned in the contract sued on not later than June 1, 1906, and that notwithstanding they continued to hold possession of and operate the plant and to claim and receive compensation from the appellant for the ballast produced thereby under the terms of the contract sued on from said 1st day of June, 1906, to the 1st day of August, 1906, without alleging or claiming any promise or assurance of any kind from the appellant of any change in said plant or the remedying of any such alleged defect, and thereby waived any right to claim damages on account of any alleged defects or insufficiency in the capacity of said plant accruing to them during the period from June 1, 1906, to August 1, 1906, and the court erred in not so advising the jury by giving them Special Instruction No. 22."

As it appears on page 114 of Appellant's Brief, and for the reasons therein and in that connection stated.

Fifty-fifth.

The Court erred in failing and refusing to sustain Appellant's Twenty-third Assignment of Error, which is as follows:

"The trial court erred in refusing to give Special Instruction No. 25 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 116 of Appellant's Brief, and for the reasons therein and in that connection stated.

Fifty-sixth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Twenty-Third Assignment of Error, which is as follows:

1472 "Even if the water furnished by appellant to appellees was not suitable for steaming purposes without being mixed with the boiler compound mentioned in the evidence, yet if the appellant furnished such compound to the appellees for use and by the use of the same said water would have been rendered reasonably fit for steaming and boiler purposes, and if the appellees agreed with the appellant that in event it furnished such boiler compound appellees would undertake to use the same and render the water fit for use, and did accept and use said compound, then any additional cost which they were put to in the operation of the plant, or any addi-

tional profits which they could have made in the operation thereof subsequent to the time when the appellant furnished said compound, on account of the kind and character of water which appellant furnished and the court erred in not so advising the jury by giving Special Instruction No. 25 asked by appellant."

As it appears on page 116 of Appellant's Brief, and for the reasons therein and in that connection stated.

Fifty-seventh.

The court erred in failing and refusing to sustain Appellant's Twenty-Fourth Assignment of Error, which is as follows:

"The trial court erred in refusing to give Special Instruction No. 27 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given it, as to the rule of law stated in said Special Instruction."

As it appears on page 118 of Appellant's Brief, and for the reasons therein and in that connection stated.

Fifty-eighth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Twenty Fourth Assignment of Error, which is as follows:

1473 "It being in evidence that the appellant and appellees had a conference on or about the 31st day of July, 1906, at which the question of alleged lack of capacity of the plant was discussed, and that the appellees asserted no claim for any damage to them at this time, nor asked any compensation for losses sustained to that time, nor asserted any claim for additional compensation for work done and ballast furnished prior to that time by reason of any alleged breach of contract on the part of the appellant and then and there asked the appellant for additional yardage and induced the appellant to install another crusher and deliver same to appellees for their use at the plant and expend money therefor, and elected to continue operating under the terms of the contract as then existing, the appellees waived all claim for damages on account of the alleged lack of capacity in the plant, or for any damages by reason of the increased cost of production of ballast, or for any damages whatsoever, and the court erred in not so instructing the jury by giving said Special Instruction No. 27."

As it appears on page 118 of Appellant's Brief, and for the reasons therein and in that connection stated.

Fifty-ninth.

The Court erred in failing and refusing to sustain Appellant's Twenty-fifth Assignment of Error, which is as follows:

"The trial court erred in refusing to give Special Instruction No.

28 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

As it appears on page 120 of Appellant's Brief and for the reasons therein and in that connection stated.

Sixty.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Twenty-Fifth Assignment of Error, which is as follows:

1474 If, as contended by the appellees, the appellant in the month of July or August, 1906, agreed to install an additional crusher, and additional boiler and engine capacity to the plant delivered by appellant to the appellees, for the purpose of increasing the capacity of said plant and failed to do so and as a result thereof the appellees were damaged, and the appellees afterwards discovered the inefficiency of said boiler plant and knew, or by reasonable diligence could have ascertained and known, that the appellant did not intend to furnish such additional boiler capacity, then the appellees had no right in law to continue the operation of said plant with said insufficient boiler capacity, to their damage, and thereafter claim damages by reason of any losses suffered in any way by them after it became known or apparent to appellees that the appellant did not intend to increase said boiler capacity, and if they did continue in the operation of said plant thereafter, it was at their own election and they could not recover for any such damages, and the court should have so advised the jury."

As it appears on page 121 of Appellant's Brief, and for the reasons therein and in that connection stated.

Sixty-first.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Twenty-Sixth Assignment of Error, which is as follows:

"It becoming apparent within a reasonable time after the alleged agreement of the appellant to furnish additional boiler power, made in July or August, 1906, that it considered the power sufficient, the appellees had their election to surrender the contract and sue for damages, or to continue the operation of the same with the plant so delivered and with the power that they then had, and to claim their compensation under the same; and having elected to take the latter course, they cannot now claim any damages for losses occasioned to them by reason of any insufficiency of
1475 boiler power after the time when they made such election, and the court should therefore have given Special Instruction No. 28."

As it appears on page 123 of Appellant's Brief, and for the reasons therein and in that connection stated.

Sixty-second.

The Court erred in failing and refusing to sustain Appellant's Twenty-Seventh Assignment of Error, which is as follows:

"The trial court erred in refusing to give Special Instruction No. 29 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 124 of Appellant's Brief, and for the reasons therein and in that connection stated:

Sixty-third.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Twenty-Seventh Assignment of Error, which is as follows:

"There being evidence tending to show that, even though the crushing plant supplied by appellant to appellees under the contract sued on did not have a maximum capacity of 1000 cubic yards per ten hours appellees would have been unable, either from the manner in which they opened or developed the quarry or the size or manner in which they broke the stone, or transported the same to the crusher, or conducted the drilling and blasting operations necessary to produce such stone, to have transported and fed to such crushers sufficient stone to have produced an average daily out put of 750 cubic yards of ballast per ten hours. The Appellees were not entitled to recover any damages, if the jury believed such to be the facts, on account of said crushing plant not having a maximum capacity of 1000 cubic yards per ten hours, and it was error on the part of the trial court not to have so instructed the jury by giving said Special Charge No. 29."

As it appears on page 124 of Appellant's Brief, and for the reasons therein and in that connection stated:

Sixty-Fourth.

The Court erred in failing and refusing to sustain Appellant's Twenty-Eighth Assignment of Error, which is as follows:

"The trial court erred in refusing to give Special Instruction No. 32 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 129 of Appellant's Brief, and for the reasons therein and in that connection stated.

Sixty-fifth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Twenty-Eighth Assignment of Error which is as follows:

"Even though the plant delivered by appellant to appellees did not have the capacity named in the contract sued on, and appellees were not aware of such fact at the time of taking possession of the same, yet if the appellees after having received possession of the same discovered, or by reasonable diligence might have discovered such fact, and notwithstanding their opportunity to discover such fact or their actual discovery thereof, they continued in the possession and operation of such plant for more than a reasonable length of time after such discovery or after a reasonable opportunity so to discover the same, and to operate and claim compensation under the terms of the contract for the operation thereof, then the appellees waived their right to any and all claims for damages as
1477 against the appellant which they might have had at the time of such waiver on account of such failure of the appellant because of the additional cost that they had been put to, if any, on account of such failure of the appellant, if any, and the appellees were not entitled to recover the same, and the court erred in not so instructing the jury and giving Special Charge No. 32."

As it appears on page 130 of Appellant's brief, and for the reasons therein and in that connection stated.

Sixty-sixth.

The Court erred in failing and refusing to sustain Appellant's Twenty-Ninth Assignment of Error, which is as follows:—

"The trial court erred in refusing to give Special Instruction No. 34 asked by the defendant, for the reasons that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 132 of Appellant's brief, and for the reasons therein and in that connection stated.

Sixty-seventh.

The court erred in failing and refusing to sustain Appellant's First Proposition under its Twenty-ninth Assignment of Error, which is as follows:

"Even though the plant supplied originally to the appellees by the appellant, or the plant after the No. 8 crusher had been installed, did not have a capacity of 1000 cubic yards of ballast in ten hours, and the failure on the part of the appellant to so originally supply such a plant or to thereafter increase the same so that it did have such a maximum capacity, decreased the output, it became incumbent upon the appellees as soon as they became aware of either of such

failures to elect whether they would continue in possession of said crushing plant and the operation thereof under said contract and produce ballast thereby, or whether they would surrender the possession of such plant and hold the appellant responsible for such damage, if any, which under the law they might recover for such violation, but they could not pursue both such courses and must have chosen between and acted upon one or the other, and the undisputed evidence showing that the appellees continued in possession of said plant and continued to operate the same, and claimed and received compensation therefor from the appellant at the contract price and did not promptly and in a reasonable time surrender the possession or desist from the operation of said plant, but continued therein beyond such reasonable time, and did not notify the appellant in receiving compensation therefor at the price named in the contract that they claimed damages or increased compensation therefor, the appellees waived all claims for damages on account of any alleged lack of capacity in said plant and could not recover for the same, and the court erred in not so instructing the jury by failing to give Special Charge No. 34."

As it appears on page 132 of Appellant's Brief, and for the reasons therein and in that connection stated.

Sixty-eighth.

The Court erred in failing and refusing to sustain Appellant's Thirtieth Assignment of Error, which is as follows:—

"The trial court erred in refusing to give Special Instruction No. 36 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in Special Instruction."

As it appears on page 134 of Appellant's Brief, and for the reasons therein and in that connection stated.

Sixty-ninth.

1479 The Court erred in failing and refusing to sustain Appellant's First Proposition under its Thirtieth Assignment of Error, which is as follows:—

"Even though the crushing plant furnished to the appellees by the appellant did not have the maximum capacity of 1000 cubic yards in ten hours, but did have an average daily capacity sufficient to crush all of the stone suitable for crushing therein which the appellees were able to supply thereto in the manner in which the appellees laid out and worked the quarry connected therewith and transported the stone therefrom to such crushing plant, then the appellees were not entitled to recover from the appellant on account of any damages, or on account of such crushing plant not having a maximum capacity to crush 1000 cubic yards of stone in ten hours, and the court erred in not so instructing the jury and giving Special Charge No. 36 asked for by the appellant."

As it appears on page 134 of Appellant's brief, and for the reasons therein and in that connection stated.

Seventieth.

The Court erred in failing and refusing to sustain Appellant's Thirty-First Assignment of Error, which is as follows:—

"The trial court erred in refusing to give Special Instruction No. 39 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 136 of Appellant's Brief, and for the reasons therein and in that connection stated.

Seventy-first.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Thirty-First Assignment of Error, which is as follows:

1489 "It being in evidence that on or about the 31st day of July,

1906, there was a meeting between the General Manager and Engineer of Maintenance of Way of the appellant and the appellees, and that at such meeting the appellees asserted no claim for damages sustained by them to that time, if they had sustained any, nor asked any compensation for loss, sustained by them to that time, if any, or asserted a claim for additional compensation for work done and ballast furnished prior to that time, if any there were, and asked for additional yardage and induced the installment by the appellant of another crusher and the expenditure of money therefor, and elected to continue operating under the terms of the contract as then existing, they as a matter of law, waived all claims for damages on account of the lack of capacity of the plant, or for damages by reason of the increased cost of the production of ballast, or by reason of any loss or damage suffered by them for any breach of duty whatsoever, if any there had been, on the part of appellant, and therefore the court should have so instructed the jury and given said Special Instruction No. 39."

As it appears on Page 136 of Appellant's brief, and for the reasons therein and in that connection stated.

Seventy-second.

The Court erred in failing and refusing to sustain Appellant's thirty-second Assignment of Error, which is as follows:—

"The trial court erred in refusing to give Special Instruction No. 41 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 138 of Appellant's brief, and for the reasons therein and in that connection stated.

Seventy-third.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Thirty-Second Assignment of Error, which is as follows:—

"It was the duty of the appellees in event the appellant had violated its contract with reference to furnishing the plant of this capacity named in the contract, upon discovering same within a reasonable time thereafter to determine whether it would be less expensive and burdensome upon the appellant for them to continue in the operation of said plant and hold the appellant for the profits which the appellees might have been enabled to make by the future operation thereof in event they had been furnished by appellant with the plant described in the contract, and in addition thereto the additional cost and expenses which the appellees reasonably were put to on account of such failure of appellant, or whether it would be less expensive and burdensome upon the appellant for the appellees to refuse to operate the plant and hold the appellant for the additional expenses which appellees had been put to on account of the failure of appellant to furnish the plant required by the contract and the future profits which appellees would have reasonably been enabled to make in event such plant so furnished had been of the kind and character described in the contract; and if it was reasonably evident to the appellees that it would be more expensive and burdensome upon the appellant for the appellees to elect to continue in the operation of such plant and collect damages from the appellant on account thereof than it would have been to have refused to further perform said contract and sue for the damages which the appellees would then be entitled to, and the appellees by continuing in the possession of such plant and in the operation thereof, and in receiving payment monthly from appellant without notification that they would require of appellant the payment of damages for violation of such contract, the appellees waived all right against the appellant for any additional cost or expenses to appellees in the production of ballast from said plant which was occasioned by reason of lack of capacity of such plant required by such contract, subsequent to the time when it was incumbent upon the appellees to elect and determine which course of conduct as above described they would pursue, and the court should have so instructed the jury and not refused to give Special Charge No. 11."

As it appears on page 139 of Appellant's Brief, and for the reasons therein and in that connection stated.

Seventy-fourth.

The Court erred in failing and refusing to sustain Appellant's Thirty-Third Assignment of Error, which is as follows:—

"The trial court erred in refusing to give Special Instruction No. 12 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury

in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on Page 141 of Appellant's brief, and for the reasons therein and in that connection stated.

Seventy-fifth.

The Court erred in failing and refusing to sustain Appellant's First proposition under its Thirty-Third Assignment of Error, which is as follows:—

"In event the appellant violated its contract in not furnishing to appellee a crushing plant of the maximum capacity described in such contract, then the appellees had the right within a reasonable time after they had become aware of such violation to remain in possession of such plant and continue their operations thereof and recover from appellant the contract price provided for the ballast produced thereby, or they had a right within a reasonable time to refuse to longer remain in possession or operate said plant and produce ballast therefrom and in event of such refusal to recover from the appellant damages recoverable at law for the violation by appellant of such contract, but they did not thereafter have the right both

1483 to continue in possession and operation of such plant and claim and receive compensation from the appellant for the ballast produced therefrom and in accordance with the contract and also to hold appellant liable for damages because of any additional amounts which they were thereafter required to expend in the production of ballast produced therefrom over and above what they would have been required to expend in event the appellant had not violated said contract with reference to such plant; and it being incumbent upon them to choose and elect within a reasonable time after they became aware of such violation, if any there was, which of said courses they would pursue, the court erred in not giving Special Instruction No. 42."

As it appears on page 142 of Appellant's Brief, and for the reasons therein and in that connection stated.

Seventy-sixth.

The Court erred in failing and refusing to sustain Appellant's Thirty-fourth Assignment of Error, which is as follows:

"The trial court erred in refusing to give Special Instruction No. 43 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on page 144 of Appellant's brief, and for the reasons therein and in that connection stated.

Seventy-seventh.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Thirty-fourth Assignment of Error, which is as follows:

"The contract sued on providing that the decision of the appellant's Engineer of Maintenance of Way should be final and conclusive in any dispute which might arise between the parties to such contract relative to or touching the same, and that each of the parties to such agreement waived any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants of said agreement, and agreed that the decision of the Engineer of Maintenance of Way, should, in the nature of an award, be final and conclusive on the rights and claims of said parties, and it appearing from the testimony that the parties intended that said contract should be performed in the Territory of New Mexico and in so far as it has been performed, has been performed within the Territory of New Mexico, and under the laws of the Territory of New Mexico the agreement referred to is a valid and binding agreement upon both parties to this suit; therefore, if the jury believe that the Engineer of Maintenance of Way of the appellant had prior to said suit decided and determined that the plant was of the capacity warranted and that the coal and water was serviceable for the purposes for which they were intended, and that all allowances which appellees would be entitled to by reason of delays on account of the lack of coal and water, or of bad character of coal and water, if any such bad coal and water existed, and that allowances therefor have been in fact allowed and made by the said Engineer of Maintenance of Way, and that appellees had been paid therefor by appellant, if any were due by reason of such allowances, then the appellees would not be entitled to recover anything by reason of the incapacity of the plant or the character or quality of the coal and water furnished on account of the decision of the Engineer of Maintenance of Way under the terms and provisions of the contract above recited, unless the jury believe that in making such decision and awards the Engineer of Maintenance of Way acted in fraud of the appellees' rights, or in such ignorance thereof as to amount in law to a fraud, and should the jury not have so believed that said Engineer of Maintenance of Way acted in fraud, or in such gross mistake as to amount to bad faith, they should have found for the defendant as to all claims arising out of matters so adjusted by said Engineer of Maintenance of Way, and the court should have so instructed the jury and given Special Charge No. 43."

As it appears on page 145 of Appellant's brief, and for the reasons therein and in that connection stated.

Seventy-eighth.

The Court erred in failing and refusing to sustain Appellant's Thirty-fifth Assignment of Error, which is as follows:

"The trial Court erred in refusing to give Special Instruction No. 43 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction.

As it appears on page 153 of Appellant's Brief, and for the reasons therein and in that connection stated.

Seventy-ninth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Thirty-fifth Assignment of Error, which is as follows:

"The contract sued on in this case providing that the decision of the company's Engineer of Maintenance of Way should be final and conclusive in any dispute which might arise between the parties to said contract relative to or touching same, and that all of the parties to such agreement by the terms thereof waive any rights of action, suit or suits, or other remedy at law, or otherwise, by virtue of the covenants contained in said agreements, and expressly agreed that the decision of the Engineer of Maintenance of Way should, in the nature of an award, be final and conclusive on the rights of the parties, and it appearing that such contract was to be performed within the Territory of New Mexico and that so much of same as has been performed was performed within such Territory and that the same was valid and binding upon the parties under the laws 1486 of the Territory of New Mexico at the time that the same was made, the matters in dispute between the parties in this case should have been submitted to the decision of the appellant's Engineer of Maintenance of Way, and not having been submitted to and acted upon by him, no judgment can be rendered in this case against the appellant arising out of any of the matters involved in said dispute, and therefore the court erred in refusing to give Special Instruction No. 45."

As it appears on page 154 of Appellant's brief, and for the reasons therein and in that connection stated.

Eighty.

The court erred in failing and refusing to sustain Appellant's Thirty-sixth Assignment of Error, which is as follows, to-wit:

"The trial court erred in refusing to give Special Instruction No. 47 asked by the defendant, for the reason that the same properly stated the law applicable to that phase of the case covered by said Special Instruction, and the court failed to properly charge the jury in its general charge to the jury, or in any charge given by it, as to the rule of law stated in said Special Instruction."

As it appears on Page 155 of Appellant's Brief, and for the reasons therein and in that connection stated.

Eighty-first.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Thirty-sixth Assignment of Error, which is as follows:

"The parties to the contract having agreed that for all delays, impediments or hindrances to the production of ballast due to the failure to furnish coal and water appellees should be compensated at the rate of fifteen dollars per day of ten hours, they would not be

entitled to recover any greater sum than at the rate of fifteen dollars a day per ten hour day for delays, hindrances or impediments
1487 in the production of ballast, whether such delays, hindrances or impediments were due to the failure to furnish any coal or water, or to furnish coal and water of a kind not adapted to the uses for which it was intended."

As the same appears on Page 155 of Appellant's brief, and for the reasons therein and in that connection stated.

Eighty-second.

The Court erred in failing and refusing to sustain Appellant's Thirty-seventh Assignment of Error, which is as follows:

"Even if Special Instruction No. 43 did not correctly state the law applicable to the facts in this case and was properly refused by the court, yet the same suggested to the court the proper charge applicable to the phase of evidence which said Special Instruction undertook to cover and amounted to a request on the part of the defendant to the court to charge the law applicable to this phase of the case, and it was error on the part of the court not to give the proper instruction covering this phase of the case."

As it appears on page 157 of Appellant's Brief, and for the reasons therein and in that connection stated.

Eighty-third.

The Court erred in failing and refusing to sustain Appellant's Thirty-eighth Assignment of Error, which is as follows:

"Even if Special Instruction No. 45 did not correctly state the law applicable to the facts in evidence in this case and was properly refused by the court, yet the same suggested to the court the proper charge applicable to the phase of evidence which said Special Instruction undertook to cover and amounted to a request on the part of the defendant to charge the law applicable to this phase of the case, and it was error on the part of the court not to give a proper instruction on this phase of the case."

As it appears on page 158 of Appellant's Brief, and for the reasons therein and in that connection stated.

1488

Eighty-fourth.

The Court erred in failing and refusing to sustain Appellant's Thirty-ninth Assignment of Error, which is as follows:

"The trial court erred in permitting the plaintiffs to introduce over the objections of the defendant the purported estimates of the cost of production of the ballast, claimed by plaintiffs to have been made by defendant's Engineer of Maintenance of Way Campbell, for the reason that it only purported to be estimates of said Campbell as to the probable cost of production. And it was not shown to have been a true and correct estimate, and was immaterial and

irrelevant to any issue in this case, and was hearsay as to the plaintiffs, as all of same appears in defendant's bill of exceptions No. 3 filed herein."

As it appears on page 159 of Appellant's brief, and for the reasons therein and in that connection stated.

Eighty-fifth.

The Court erred in failing and refusing to sustain Appellant's Proposition under its Thirty-ninth Assignment of Error, which is as follows:

"The trial court erred in permitting the appellees to introduce evidence over the objection of the appellant — the purported estimate of the costs of production of ballast claimed by appellees to have been made by the appellant's Engineer of Maintenance of Way, for the reason that it was immaterial and irrelevant to any issue in the case, because there was no pleading that the estimate was fraudulently made and offered to the appellees to induce action on their part of the proof to raise that issue, and there was no proof that it was relied upon by the appellees or mislead them to their prejudice."

As it appears on page 159 of Appellant's Brief, and for the reasons therein and in that connection stated.

Eighty-sixth.

The court erred in failing and refusing to sustain Appellant's Fortieth Assignment of Errors, which is as follows:

"The trial court erred in declining to permit the witness Campbell to testify as to conversations and facts leading up to and inducing the entering into of the supplemental contract of December 13, 1906, by the terms of which the contract existing between the plaintiffs and the defendant providing for the doing of the work at Tecolote was in some respects altered, on the objections of the plaintiffs that such testimony would be immaterial and irrelevant, and would tend to vary the terms of said written contract, which the plaintiff contended was unambiguous on its face, as all of which appears from defendant's bill of exceptions No. 34 filed herein."

As it appears on page 161 of Appellant's brief, and for the reasons therein and in that connection stated.

Eighty-seventh.

The Court erred in failing and refusing to sustain Appellant's Proposition under its Fortieth Assignment of Error, which is as follows:

"The court having permitted Wm. Eichel one of the appellees, to testify as to conversations with Campbell, the appellant's Engineer of Maintenance of Way, prior to the execution of the original contract, the appellant should have been permitted to prove the conversations and negotiations leading up to the execution of the sup-

plementary contract of December 13, 1906, which conversations and negotiations were reasonably calculated to throw light upon the meaning and purpose of the parties executing that supplemental contract, and the refusal of the court to permit the introduction by the appellant of this testimony, *of* the character of testimony previously introduced by appellant was prejudicial to the rights of appellant."

As it appears on page 161 of Appellant's Brief, and for the reasons therein and in that connection stated.

Eighty-eighth.

1490 The Court erred in failing and refusing to sustain Appellant's Forty-first Assignment of Error, which is as follows:

"The trial court erred in permitting Wm. Echel, one of the plaintiffs, to testify that the amount of the pay rolls covering the work done under the contract sued on was \$96,000 for the following reasons, to-wit:

"(1) The cost of the production of the ballast was immaterial and irrelevant to any issue in this case.

"(2) The plaintiff, Wm. Echel, had testified that he had no knowledge as to the actual amount of the pay rolls except from his examination of the same, and that while he paid the amounts due with his checks, he could not remember the amounts paid except from the pay rolls and that he did not make the pay rolls and had no knowledge of the verity whereof, and knew nothing of his own knowledge as to the amounts of the pay rolls and the items covered by them except as shown by the pay rolls, and the verity of which pay rolls was not testified to by any other witness, and for the further reason that said testimony was hearsay, all of which appears in defendant's bill of exceptions No. 5 filed herein."

As it appears on page 163 of Appellant's brief, and for the reasons therein and in that connection stated.

Eighty-ninth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Forty-first Assignment of Error, which is as follows:

"In view of the fact that appellees undertook to produce ballast under the contract for appellant, and the appellant agreed to pay therefor a specific fixed amount, to wit: 45 cents per cubic yard for the ballast so produced, the cost of the labor used in producing the same was immaterial and irrelevant to any issue in the case and the admission of testimony as to the same was harmful to appellant and therefore the court erred in permitting the witness Echel

1491 to testify over the objections of appellant that the amount of said pay rolls was \$96,000 as shown by defendant's Bill of Exceptions No. 5 filed herein."

As it appears on page 164 of Appellant's brief, and for the reasons therein and in that connection stated.

Ninety.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Forty-first Assignment of Error, which is as follows:

"The plaintiff Eichel having testified that he had no knowledge as to the actual amount of the pay roll except from his examination of the same, and that while he paid the amounts due with his checks he could not remember the amounts paid except from the pay roll, and the verity of the correctness of the pay roll not being established, nor sought to be established by the testimony of any witness, and the witness Eichel testifying that he knew nothing about the amount paid for labor except as shown by said pay roll, the court erred in permitting the witness Eichel to testify to the amount shown by said pay roll and the amount paid for labor, over the objections of the appellant, because the said witness was not testifying from his own knowledge, nor testifying from any document duly verified, and said testimony was hearsay, and because there was better evidence of the fact if it was a fact."

As it appears on page 171 of Appellant's brief, and for the reasons therein and in that connection stated.

Ninety-first.

The Court erred in failing and refusing to sustain Appellant's Forty-second Assignment of Error, which is as follows:

"The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs, over the objections of the defendant, that plaintiffs paid out for explosives the sum of \$18,900 for the reason that the amounts expended by plaintiffs in the purchase of explosives was immaterial and irrelevant to any issue in this 1492 case, and for the further reason that the testimony showed that he had no personal knowledge or recollection of the payment of such bills but had to rely upon the books, accounts and invoices in his possession, which books, accounts and invoices were not made by him, and for the further reason that said testimony was hearsay, all of which appears in defendant's Bill of Exceptions No. 6 filed herein."

As it appears on page 172 of Appellant's brief, and for the reasons therein and in that connection stated.

Ninety-second.

The court erred in failing and refusing to sustain Appellant's First Proposition under its Forty-second Assignment of Error, which is as follows:

"In view of the fact that the appellees undertook to produce ballast under the contract for appellant, and the appellant agreed to pay therefor a specific, fixed amount, to wit: forty five cents per cubic yard for the ballast so produced, the cost of the explosives used in the production of the same by appellees was immaterial and irrelevant

to any issue in the case, and the admission of testimony as to the same was harmful to appellant and therefore the court erred in permitting the witness Eichel to testify over the objections of appellant that appellees paid out for said explosives the sum of eighteen thousand nine hundred dollars."

As it appears on page 173 of Appellant's brief, and for the reasons therein and in that connection stated.

Ninety-third.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Forty-second Assignment of Error, which is as follows:

"The evidence showing that the witness Eichel had no personal knowledge or recollection of the amount paid out for explosives, but had to rely upon books, accounts and invoices, in his possession which were not made by him and the verity or correctness of which was not established by any evidence, it is error for the court to have allowed the witness to testify that appellees paid out for explosives the sum of eighteen thousand nine hundred dollars, for the reason that same was hearsay."

As it appears on page 174 of Appellant's brief, and for the reasons therein and in that connection stated.

Ninety-Fourth.

The Court erred in failing and refusing to sustain Appellant's Third Proposition under its Forty-second Assignment of Error, which is as follows:

"The Court erred in permitting the witness to testify as to the amount of money expended for explosives used in the prosecution of the work under the contract sued on, over the objections of appellant, for the reason that the evidence shows that in giving such testimony the witness did not rely on his personal recollection, but upon a certain memorandum which he was allowed to consult and which was not shown to have been made by him contemporaneously with the time of the transaction therein recorded."

As it appears on page 175 of Appellant's brief, and for the reasons therein and in that connection stated.

Ninety-fifth.

The Court erred in failing and refusing to sustain Appellant's Forty-third Assignment of Error, which is as follows:

"The trial court erred in permitting the plaintiff to prove by Wm. Eichel, one of the plaintiffs, over the objections of the defendant, that the plaintiffs had paid out for lubricating oils used in the operation of such plant in the performance of the work under said contract the sum of \$1300, for the reason that the same was immaterial and irrelevant to any issue in this case, and for the further reason that

the evidence showed that the said Wm. Eichel had no personal knowledge of the payment of each amount, but relied upon the books, accounts and invoices in his possession, which books, accounts and invoices were not made by him and as to the verity of which no proof was offered, and for the further reason that the said testimony
1494 was hearsay, all of which appears in defendant's bill of exceptions No. 7 filed herein."

As it appears on page 176 of Appellant's brief, and for the reasons therein and in that connection stated.

Ninety-sixth.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Forty-third Assignment of Error, which is as follows:

"In view of the fact that appellees undertook to produce ballast under the contract for appellant, and the appellant agreed to pay therefor a specific, fixed amount, to wit: forty-five cents per cubic yard for the ballast so produced, the cost of the lubricating oil used by the appellees in the production of such ballast was immaterial and irrelevant, and the admission of testimony as to the same was harmful to appellant, and therefore the court erred in admitting such testimony."

As it appears on page 177 of Appellant's brief, and for the reason therein and in that connection stated.

Ninety-seventh.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Forty-third Assignment of Error, which is as follows:

"The evidence having shown that the witness Eichel had no personal knowledge of the amount paid out for lubricating oil, but relied alone upon books, accounts and invoices in his possession not made by him, and as to the verity and correctness of which there was no proof, such evidence was hearsay and inadmissible and the court erred in admitting same, therefore over the objections of appellant."

As it appears on page 178 of Appellant's brief, and for the reasons therein and in that connection stated.

Ninety-eighth.

The Court erred in failing and refusing to sustain Appellant's Forty-fourth Assignment of Error, which is as follows:

"The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs herein, over the objections of the defendant, that plaintiffs had expended for fuel for stock in the performance of the work under the contract sued on the sum of \$1500 for the reason that the same was immaterial and irrelevant to any issue in this case, and for the further reason that the evidence showed that the said Wm. Eichel had no personal knowledge of the

payment of this sum but relied upon books, accounts and invoices in his possession, which books, accounts and invoices were not made by him and the verity of which was not proven and for the further reason that the said testimony was hearsay, all of which appears in defendant's bill of exceptions No. 8 filed herein."

As it appears on page 179 of Appellant's brief, and for the reasons therein and in that connection stated.

Ninety-nine.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Forty-fourth Assignment of Error, which is as follows:

"In view of the fact that appellees undertook to produce ballast under the contract for appellant, and the appellant agreed to pay therefor a specific, fixed amount, to-wit: forty-five cents per cubic yard for the ballast so produced, the cost of the food for stock used in the performance of the work of producing said ballast was immaterial and irrelevant, and the court erred in permitting the witness Eichel to testify that he expended for such food the sum of fifteen hundred dollars."

As it appears on page 180 of Appellant's brief, and for the reasons therein and in that connection stated.

One hundredth.

The Court erred in failing and refusing to sustain Appellant's Second Proposition under its Forty-fourth Assignment of Error, which is as follows:

"The evidence in the case showed that Eichel, the witness, had no personal knowledge of the payment of the sum of fifteen hundred dollars for food, but relied wholly upon books, accounts and invoices in his possession, which books, accounts and invoices were not made by him and the verity of which was not proven, and the testimony was therefore hearsay."

As it appears on page 181 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred One.

The Court erred in failing and refusing to sustain Appellant's Forty-fifth Assignment of Error, which is as follows:—

The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs, that plaintiffs had paid for bonds insuring the performance of the work under the contract sued on and the protection of the property used in the performance of the work under the contract sum of \$10,000 for the reason that the same was immaterial and irrelevant to any issue in this case, and for the further reason that the evidence showed that the said Wm. Eichel had no personal knowledge as to such payments but relied upon the books and accounts in his possession, which books and accounts were not

made by him and the verity of which was not proven, and for the further reason that the said testimony was hearsay, all of which appears in defendant's bill of exceptions No. 9 filed herein."

As it appears on page 182 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Two.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Forty-fifth Assignment of Error, which is as follows:—

"In view of the fact that the contract sued on provided that the appellant should pay to the appellees a fixed, specific amount, 1497 to-wit: forty-five cents for the ballast produced, and that the appellees should pay all the expenses of producing the same, the amount paid by appellees as premium for bonds insuring the performance of the work was immaterial and irrelevant, and harmful to appellant, and the court erred in permitting the witness to testify as to the amount that they had paid for such bond."

As it appears on page 183 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Three.

The Court erred in failing and refusing to sustain Appellant's Forty-sixth Assignment of Error, which is as follows:—

"The trial court erred in permitting the plaintiffs to prove by Wm. Eichel, one of the plaintiffs, over the objections of the defendant, that the plaintiffs had paid out for railroad fare and for hire of car to bring the men to do the work under the contract sued on from Milltown, Indiana, to Tecolote, New Mexico, the sum of \$900 for the reason that the same was immaterial and irrelevant to any issue in the case and for the further reason that the evidence showed that the said Wm. Eichel had no personal knowledge as to such payments, but relied upon the books and accounts in his possession, which books and accounts were not made by him and the verity of which was not proven, and for the further reason that the said testimony was hearsay, all of which appears in defendant's bill of exceptions No. 10 filed herein."

As it appears on page 184 of Appellant's brief, and for the reasons therein and in that connection stated.

One Hundred Four.

The Court erred in failing and refusing to sustain Appellant's First Proposition under its Forty-sixth Assignment of Error, which is as follows:—

"In view of the fact that the contract sued on provided that the appellant should pay to appellees a fixed, specific amount, to-wit: forty-five cents per cubic yard for the ballast produced, and that the appellees should pay all the expenses of producing the same, the

amount paid by appellants for railroad fare and for hire of
1498 car to bring men to do the work under the contract sued on
from Milltown, Indiana, to Tecolote, New Mexico, was im-
material and irrelevant, and harmful to appellant, and the court
erred in permitting the witness to testify as to the amount so ex-
pended."

As it appears on page 185 of Appellant's Brief, and for the reasons
therein and in that connection stated.

One Hundred Five.

The Court erred in failing and refusing to sustain Appellant's
Forty-seventh Assignment of Error, which is as follows:—

"The trial court erred in permitting the plaintiffs to prove by
Wm. Eichel, one of the plaintiffs, over the objections of the defend-
ant, that the ordinary and reasonable allowance for the depreciation
of the value of the plant during the time engaged in the work cov-
ered by this contract was \$6650 for the reason that the same was
immaterial and irrelevant to any issue in the case, and for the fur-
ther reason that this defendant was in no wise responsible for the
wear and tear and depreciation in value of the property used in the
contract, and the evidence of the said Wm. Eichel showed that the
same was not based upon his own knowledge and was a mere guess
or surmise as to the reasonable value."

As it appears on page 186 of Appellant's Brief, and for the reasons
therein and in that connection stated.

One Hundred Five.

The Court erred in failing and refusing to sustain Appellant's
First Proposition under its Forty-seventh Assignment of Error,
which is as follows:—

The contract sued on requiring that the appellees should do the
work therein provided for and produce the ballast thereby called
for, and pay all the costs of the production of the same and that the
appellant should only be liable to pay to the appellees a fixed amount
of forty-five cents per cubic yard for the ballast produced, the
1499 depreciation in the value of the plant used by the appellees
in the production of said ballast and the evidence of the
same were immaterial and irrelevant to any issue in the case, and it
was error for the court to have allowed the witness Eichel to testify
to any depreciation in the value of said plant."

As it appears on page 187 of Appellant's Brief, and for the rea-
sons therein and in that connection stated.

One Hundred Six.

The Court erred in failing and refusing to sustain Appellant's
Forty-eighth Assignment of Error, which is as follows:—

"The trial court erred in permitting the plaintiffs to prove by Wm.
Eichel, one of the plaintiffs, the cost of certain tents and houses

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in said contract and agreement provided, nor has said engineer of maintenance of way ever determined that there was anything due from this defendant to said plaintiffs on account of the matters and things by said plaintiffs complained of, except as set out and described in the plea next herein contained, and that said plaintiffs have never submitted to said engineer of maintenance of way for a decision thereof in accordance with said contract and agreement the matters and facts so by them complained of, except as hereinafter referred to in the plea next herein contained, and defendant alleges that all the matters complained of were and are matters in dispute between plaintiffs and defendant arising out of, relative to, and touching said contract and agreement sued on by plaintiffs within the terms, contemplation, and intent thereof, and defendant further says that all the matters and claims which said plaintiffs have so submitted to said engineer of maintenance of way for his decision under and in accordance with such agreement as aforesaid contained in the next following plea have been passed upon and determined by said engineer of maintenance of way and that this defendant has fully paid to said plaintiffs all such amounts determined by said engineer of maintenance of way to be due thereto under said contract."

2. The introduction of specific proof, *i. e.*, the decisions of this court as set out in the record (pp. 98-100).

3. Defendant's special charges Nos. 43 and 45 requested and refused (R., 80-82), wherein it was plainly set forth that the defendants relied upon this specific defense.

4. In the Court of Civil Appeals, by assignments of error Nos. 47 and 49, assigning error below in refusing to give the specific charges requested Nos. 43 and 45 (R., 90).

5. Petition for rehearing in that court (Assignment 79, R., 172).

It is submitted that the record in both trial court and in the Court of Civil Appeals thus directly raised the Federal question, to wit, the *right* to have the law of New Mexico—as established by the decisions of this court—applied to the determination of the controversy. That right stood upon the basis of *Federal* law. Hence the contention that the courts below could ignore that law without directly deciding adversely upon a Federal right is, we submit, unsound.

It is error to assume (as does opposing brief) that the claim of conflict with controlling Federal law must be set up in any special form of language. If the decision *in effect* denies a right set up which is Federal in its nature, the requirement has been fully met.

Thus, in *Murray vs. Charleston*, 96 U. S., 432, 441-442, it was pertinently said:

“In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held that we may review the judgments of a State court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised. In *Crowell vs. Randall* (10 Pet., 368), it was laid down, after a review of almost all our previous decisions ‘that it is not necessary the question should appear on the record to have been raised, and the decision made in direct and positive terms, *in ipsissimis verbis*, but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment.’ This case was followed by *Armstrong et al. vs. The Treasurer of Athens County* (16 Id., 281), where it was held sufficient to give this court jurisdiction if it appear from the record of the State court that the Federal question was necessarily involved in the decision, and that the court could not have given the judgment or decree

which they passed without deciding it. See also *Bridge Proprietors vs. The Hoboken Company*, 1 Wall, 116, and *Furman vs. Nichol*, 8 *Id.*, 44."

In *Green Bay, &c., Canal Company vs. Patten Paper Co.*, 172 U. S., 58, 67, 68, it was said:

"There is a class of cases wherein it has been held and laid down as settled doctrine that 'the revisory power of this court does not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the State court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States; that if a party intends to invoke for the protection of his rights the Constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare "specially," that is, unmistakably, this court is without authority to re-examine the final judgment of the State court; that this statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference.'

"The last elaborate discussion of this phase of the subject is found in the opinion of the court in *Oxley Stave Company vs. Butler County*, 166 U. S., 648, delivered by Mr. Justice Harlan, in which many of the cases are reviewed and from which the preceding quotation is taken.

"But no particular form of words or

phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the State court in such manner as to bring it to the attention of that court.

“ ‘The true and rational rule,’ this court said in *Bridge Proprietors vs. Hoboken Co.*, 1 Wall., 116, 143, ‘is that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.’ In *Roby vs. Colchour*, 146 U. S., 153, 159, it was said that ‘our jurisdiction being invoked, upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment.’ ‘If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the State court could not have given judgment without deciding it, that will be sufficient.’ *Powell vs. Brunswick County*, 150 U. S., 433, 440; *Sayward vs. Denny*, 158 U. S., 180; *Chicago, Burlington, &c., Railroad vs. Chicago*, 166 U. S., 226.”

In *Chicago Life Ins. Co. vs. Needles*, 113 U. S., 574, 579, it was said:

"The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the Auditor of State proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States, has been withheld or denied by the judgment below. And our jurisdiction is not defeated, because it may appear, upon examination of this Federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a Federal nature must, therefore, be denied."

In *Chapman vs. Goodnow*, 123 U. S., 540, 548, it was said:

"If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right within the meaning of section 709 of the Revised Statutes, as if

it had been specifically referred to and the right directly refused."

In *Sayward vs. Denny*, 158 U. S., 180, 184, in stating the jurisdictional propositions which "must be regarded as settled," the opinion states:

"6. The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed. *Hoyt vs. Sheldon*, 1 Black, 518; *Maxwell vs. Newbold*, 18 How., 511, 515. 7. Or, at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the State court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the State court can be held to have disposed of such Federal question by its decision. *Powell vs. Brunswick County*, 150 U. S., 400, 433."

The citations from the record in this case *supra* do show that the question was directly involved, "by clear and necessary intendment," by (1) pleading, (2) proof, (3) instructions asked and refused, and (4) errors assigned thereon. The courts below cannot be charged with failure to apprehend the meaning of the defendant's contention that the Federal law and rule distinctly applicable in the Territory of New Mexico could not be set up without thereby invoking the protection of the

Federal Constitution. The right was so claimed "by clear and necessary intendment," and was as clearly ignored. It was hence denied.

Chapman vs. Goodnow, supra.

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The Motion to Affirm.

No argument in support of the motion to affirm is submitted on the brief filed in support of pending motion. But damages are demanded upon the assertion that the pending writ was sued out "without probable cause." That contention we deny:

A. The contract herein (R., 102-107) and the specifications "forming a part of the attached contract" (R., 107-111) expressly provide that—

"The decisions of the chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; and each of the parties hereto waives any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants herein, so that the decision of said chief engineer shall, in the nature of an award, be final and conclusive on the rights and claims of said parties."

R., pp. 104 and 111.

That this stipulation was as broad as the agreement; covered each and every matter agreed to be done or performed by each party, and out of which any dispute could arise, is too plainly expressed to

✕ See also:

A. J. & S. F. Lytle v. Corns 23 U.S. 55

Lycoming Fire Ins. Co. v. Wright 60 Vt. 51

require extended discussion to further demonstrate. Certainly the words "in any dispute which may arise between the parties to this agreement *relative to or touching the same*" are all-embracing. Damages are here claimed because disputes did arise over the plaintiff in error's alleged failure to perform certain of its covenants therein. The agreement to settle them in the exclusive method presented was as clearly binding upon each party to the agreement as it would have been in respect of disputes over alleged failures of the defendants in error to perform their "covenants herein."

We also submit:

B. The binding force of such agreement has been clearly ruled in cognate cases decided by this court and here plead in evidence.

C. That such decisions make the controlling rule of law in the Territory of New Mexico is perfectly clear.

D. That refusal to apply them as the law of the land in respect of New Mexico *did* deny to plaintiff in error a plain and fundamental Federal right.

E. Thereby the jurisdiction of this court was properly invoked.

F. The question raised is in no sense frivolous, nor has it been foreclosed by prior decisions. Certainly, as here developed, the question presented fully negatives the contention that the writ was issued "without probable cause." To enforce the contract according to its clear terms and by the controlling law of the place of performance is fully within the right of plaintiff in error. It cannot justly be punished for pursuing that right.

We submit the motions should be denied.

Respectfully submitted,

W. C. KEEGIN,
ALDIS B. BROWNE,
Counsel for Plaintiff in Error.

FILED.

NOV 23 1912

JAMES H. MCKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 252.

EL PASO & SOUTHWESTERN RAILROAD
COMPANY, PLAINTIFF IN ERROR,

vs.

EICHEL & WEIKEL, A FIRM COMPOSED OF WIL-
LIAM EICHEL AND ADAM WEIKEL.

/

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE
FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF
TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,
Attorneys for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES.

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IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE
FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF
TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The brief heretofore filed in opposition to the motion to dismiss or affirm contains a statement of the case. Adverting thereto to avoid repetition here, we add only that the specific defences urged upon review in this court are:

1st. That this controversy grows out of a contract between the parties hereto and recovery is sought for alleged breaches thereof by plaintiff in error. The parties have no other relation than such as arises under and grows out of this contract.

2. By the terms of that contract it was expressly provided (R., 111):

“The decision of the company’s engineer of maintenance of way shall be final and conclusive in *any* dispute which may arise between the parties to this agreement *relative to or touching the same*; and each of the parties hereto waive any right of action, suit or suits, or other remedy in law, or otherwise, by virtue of the covenants herein, so that the decision of said engineer of maintenance of way shall, in the nature of an award, be final and conclusive on the rights and claims of said parties.” (Italics ours.)

3. The judgment here under review ignores this express agreement and awards damages upon specific items of dispute, notwithstanding this plain agreement of the parties *supra*.

4. The plaintiff in error in repeated ways, *i. e.*, in pleading (R., 38-41); in requested charges to the jury (R., 80-82); in assignments of errors (R., 90), and petition for rehearing in the Court of Appeals, to which the writ of error runs (R., 172), dis-

tinctly plead this provision of the agreement as controlling and in bar of any action—

a. Because the contract was made and to be performed within the Territory of New Mexico and hence to be determined by the applicable law of that Territory; and

b. That by the decisions of this court duly offered in evidence, and controlling as establishing the law of New Mexico the agreement, *supra*, made the engineer's determination and award conclusive "in *any* dispute " which may arise between the parties to " this agreement relative to or touching the " same," with express waiver of all rights of action "or other remedy in law, or otherwise, by virtue of the covenants herein."

5. That the controlling law of New Mexico as thus established is the *Federal* law which, having been set at naught by the court below, constitutes jurisdictional error reviewable here.

ARGUMENT.

The law applicable in New Mexico as the admitted place of making and performance of the contract out of which this dispute arises was introduced in evidence at the trial (R., 98-100), being the decisions of this court in—

Kihlberg vs. The United States, 97 U. S., p. 398.

Sweeney vs. The United States, 109 U. S., p. 618.

Martinsburg & Potomac R. R. Co. vs. March, 114 U. S., 549.

Chicago & Santa Fe R. R. vs. Price, 138 U. S., p. 185.

United States vs. Robeson, 9 Pet., p. 319.

United States vs. Gleason, 175 U. S., p. 588.

Mercantile Trust Co. vs. Hensey, 205 U. S., p. 298.

The substantial ruling of the court is set forth under each case as cited.

In *Kihlberg vs. The United States* plaintiff executed a contract with the Government for the transportation of military supplies. The agreement (*inter alia*) provided (p. 400):

“Transportation to be paid in all cases
 “according to the distance from the place
 “of departure to that of delivery, the distance to be ascertained and fixed by the
 “chief quartermaster of the district of New
 “Mexico, and in no case to exceed the distance by the usual and customary route.”

In considering the legal effect of this provision of the contract this court said (pp. (401-402) :

“The terms by which the power was conferred and the duty imposed are clear and precise, leaving no room for doubt as to the intention of the contracting parties. They seem to be susceptible of no other interpretation than that the action of the chief quartermaster in the matter of distances was intended to be conclusive. There is neither allegation nor proof of fraud or bad faith upon his part. * * * His action cannot, therefore, be subjected to the revisory power of the courts without doing violence to the plain words of the contract. * * * The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument.”

This language is most apposite to the instant case. The language of the contract here is equally plain and all-embracing—

“ in *any* dispute which may arise between the parties to this agreement relative to or touching the same”;

The company's engineer passed on all items and claims presented and made his award. There is no proof of fraud or bad faith on his part. The plain provision of the agreement demonstrates that the cited case and the present case stand on all fours.

The rule declared in the Kihlberg case was followed in *Sweeney vs. United States*, *supra*, and ap-

plied to the contract there involved, wherein the certificate of the Government officer as to the construction and completion of the work was expressly required. Such officer refused to so certify, and there being no proof of fraud or bad faith the plain doctrine of the Kihlberg case was accordingly applied.

In *Martinsburg & Potomac Railroad Co. vs. March*, *supra*, this court said that the case "is within the principles" announced in the Kihlberg and Sweeney cases, the contract involved providing that the company's engineer "shall in all cases
 " decide every question which can or may arise relative to the execution of this contract on the part
 " of said contractor, and his estimate shall be final
 " and conclusive."

Directly commenting upon this provision the court said (p. 554):

" Neither party reserved the right to revise that determination for mere errors or mistakes upon his part. They chose to risk his estimates, and to rely upon their right, which the law presumes they did not intend to waive, to demand that the engineer should, at all times, and in respect of every matter submitted to his determination, exercise an honest judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith."

In *Chicago & Santa Fe Railroad vs. Price*, 138 U. S., 185, *supra*, the contract there involved, contained the provision (p. 190):

“ and said chief engineer shall decide every
 “ question which can or may arise between
 “ the parties relative to the execution
 “ thereof, and his decision shall be binding
 “ and final upon both parties * * * .”

The court expressly cites the former cases noted *supra*, and, after quoting from the March case, adds (pp. 194-195):

“ The only difference between that case
 “ and the present one is that the alleged mis-
 “ takes of the engineer in the former
 “ were favorable to the railroad company,
 “ while in this case they are favorable to the
 “ contractors. But that difference cannot
 “ affect the interpretation of the contract.
 “ * * * Any decision of the chief engi-
 “ neer relating to the execution of the con-
 “ tract was to be ‘binding and final upon
 “ ‘both parties.’ * * * The mere incom-
 “ petency or mere negligence of the division
 “ or chief engineer does not meet the re-
 “ quirements of the case, unless their mis-
 “ takes were so gross as to imply bad faith.”

In *United States vs. Gleason*, 175 U. S., 588, *supra*, the question involved was whether the refusal of the Government engineer to grant an extension of time to the contractors to complete a public work (such extension by the terms of the written contract being lodged with that officer) could be reviewed by the courts. In holding against such right of review the court said (page 608-609):

" Without protracting the discussion, our
 " conclusions are that, under a proper con-
 " struction of the contracts in this case, the
 " right or privilege of the contractors, if
 " they failed to complete their work within
 " the time limited, to have a further exten-
 " sion or extensions of time, depended upon
 " the judgment of the engineer in charge
 " when applied to to grant such extension
 " and that no allegation or finding is shown
 " in this record sufficient to justify the court
 " in setting aside the judgment of the en-
 " gineer as having been rendered in bad
 " faith, or in any dishonest disregard of the
 " rights of the contracting parties."

In *Mercantile Trust Co. vs. Hensey*, 205 U. S.,
 298, *supra*, the court held that under the terms of
 the agreement there involved the certificate of the
 architect was not conclusive upon the owner to the
 extent of preventing him from asserting that the
 contractor had not properly performed his work,
 but the court cites the cases reviewed *supra*, and
 adds (page 309) that they—

" were all cases in which the contract itself
 " provided that the certificate should be
 " final and conclusive between the parties."

The relation of the parties hereto was created
 solely by the terms of their written contract.
 Thereunder "the decision of the company's engi-
 " neer of maintenance of way shall be final and
 " conclusive in *any* dispute which may arise be-
 " tween the parties to this agreement *relative to or*
 " *touching the same*," with express waiver of all

rights of action, "so that the decision of said engineer of maintenance of way shall, in the nature of an award, be final and conclusive on the rights and claims of said parties."

By the contract each party thereto was called upon to do certain specified affirmative things. The complaint herein shows that the plaintiff's demands relate wholly to matters and things arising out of and relating wholly to this contract. Hence, plainer language could not have been employed to declare that such disputes were those "relative to or touching" the agreement. The action and award of the company's engineer was hence "final and conclusive on the rights and claims of the parties." The language is all-embracing.

Tested by the plain principles declared by this court in the cognate cases plead as evidence and cited *supra*, it is clear that the laws of the Territory of New Mexico—the place of the contract and the place of its performance—is established by these decisions as clearly and as effectually as if declared by express statute. Indeed, in such a case as this, it is obvious that the law could only be declared by judicial expression. As these decisions establish the law in the *place* where alone the contract applied, we submit they are here controlling and require the reversal of the judgment.

Respectfully submitted,

ALDIS B. BROWNE,
ALEXANDER BRITTON,
EVANS BROWNE,

Attorneys for Plaintiff in Error.



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Office Supreme Court, U. S.

FILED.

APR 13 1912

JAMES H. MCKENNEY,

CLERK.

*MOTION TO AFFIRM WITH DAMAGES AND TO
DISMISS.*

IN THE SUPREME COURT OF
THE UNITED STATES

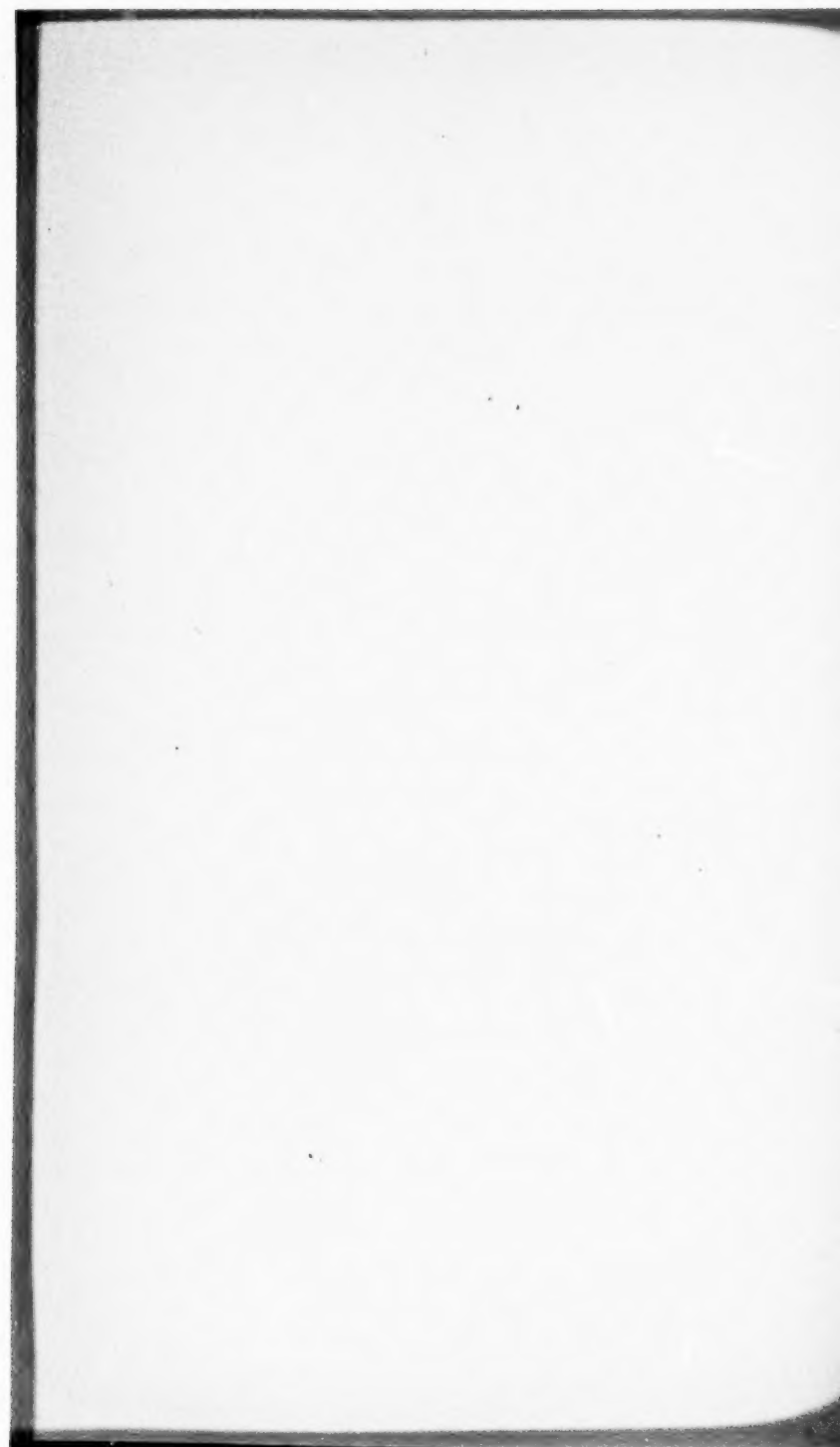
No. ~~97~~ 252.

October Term, 1911.

*EL PASO & SOUTHWESTERN RAILROAD COMPANY,
Plaintiff in Error,*

vs.

*EICHEL & WEIKEL, A FIRM COMPOSED OF WILLIAM
EICHEL AND ADAM WEIKEL, Defendants in Error.*



MOTION TO AFFIRM WITH DAMAGES AND TO
DISMISS.

IN THE SUPREME COURT OF
THE UNITED STATES

No. 547.

October Term, 1911.

EL PASO & SOUTHWESTERN RAILROAD COMPANY,
Plaintiff in Error,

vs.

EICHEL & WEIKEL, A FIRM COMPOSED OF WILLIAM
EICHEL AND ADAM WEIKEL, *Defendants in Error.*

Comes now the Defendants in Error herein by Waters Davis, J. M. Goggin, Richard F. Burges and Phillip W. Frey, their counsel, appearing in that behalf, and move the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction because it is manifest that the Assignments of Error upon which the Writ of Error in the above numbered and entitled cause was sued out, do not present a Federal question in this that in the final judgment and decree of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, being the highest court of the State of Texas, in which a decision in the above entitled suit could be had, there was not drawn in question the validity of any treaty or statute of, or an authority exercised under, the United States, nor was there drawn in question the validity of any

statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, nor was there called in question any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, by either party under such Constitution, treaty, statute, commission or authority;

Because the judgment or decree from which said writ of error purports to have been taken is the judgment or decree of the Court of Civil Appeals of one of the United States, to-wit, the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

And the said Defendants in Error, by counsel as aforesaid, also move the Court to affirm the said judgment or decree from which the said writ of error purports to have been taken, and to assess and decree that the plaintiff in error shall pay damages to the defendants in error in the sum of ten per cent. upon the amount of the final judgment in said cause because it is manifest that said writ of error was sued out for delay only and because the taking out of said writ of error has delayed the proceedings on the judgment of the inferior court, and said writ of error manifestly appears to have been sued out merely for delay, and defendants in error pray for such further and other relief that this Court may see fit to grant, upon the hearing of this motion.

11. C. A. 17 The counsel for plaintiff in error are ~~T. T. Vander~~
~~W. A. Hawkins~~, who resides in Washington, D. C., and W. A. Hawkins, John Franklin, W. W. Turney and Wm. H. Burges, who reside at El Paso, Texas.

James Davis
Philip W. Frey
James H. Grogan
Richard F. Burges
Counsel for the Defendants in Error.

WATSON COURT, U. S.
FILED

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WATSON COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1911

No. 252

EL PASO & SOUTHWESTERN RAILROAD COMPANY
Plaintiff in Error.

**RICHEL & WEIKEL, A FIRM COMPOSED OF WILLIAM
RICHEL AND ADAM WEIKEL, Defendants in Error.**

In error to the Court of Civil Appeals for the Fourth
Supreme Judicial District of the State of Texas.

Brief of Counsel for Defendant in Error upon motion
to affirm, with damages and to dismiss.

WATSON DAVIS,
PHILIP W. FRY,
J. M. GOSLIN,
RICHARD F. BURMAN,
Counsel for Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1911.

No. 547.

EL PASO & SOUTHWESTERN RAILROAD COMPANY,
Plaintiff in Error.

vs.

*EICHEL & WEIKEL, A FIRM COMPOSED OF WILLIAM
EICHEL AND ADAM WEIKEL, Defendants in Error.*

In error to the Court of Civil Appeals for the Fourth
Supreme Judicial District of the State of Texas.

Brief of Counsel for Defendant in Error upon motion
to affirm, with damages and to dismiss.

STATEMENT.

The motion to dismiss the writ of error in this cause is predicated upon the proposition that it is manifest from the assignments of error upon which the writ of error in this cause was sued out, that this cause presents no Federal question for the reason that in the final judgment or decree of the Court of Civil Appeals of Texas, being the highest court of the State of Texas, in which a decision in the above entitled suit could be had, there was not drawn in question the validity of any treaty or statute, of, or authority exercised under the United States, nor was there drawn in question the validity of any statute of or an authority exercised under

any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States nor was there called in question any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of or commission held or authority exercised under the United States by either party under such Constitution, or any treaty, statute, commission or authority.

The Plaintiff in Error alleges that the trial court and the Court of Civil Appeals of Texas, "denied to appellant a right guaranteed to it by the constitution and laws of the United States requiring that full faith and credit should be given to said laws (of New Mexico) in any court within the United States as it had by law or usage in the courts of New Mexico and thereby was drawn in question the validity of an authority exercised and a right, privilege and immunity claimed by appellant under the constitution and laws of the United States."

No provision of the written laws of the Territory of New Mexico was in controversy in this cause. The sole contention of plaintiff in error is that the courts of Texas interpreted a written contract executed and partly performed in New Mexico in a different manner than the Supreme Court of the United States has construed similar clauses of different contracts. No evidence was offered of any law of New Mexico on the subject of the controverted contract except seven decisions from the Supreme Court of the United States construing contracts alleged to be similar. (Tr. of Record p. 233.)

Every issue raised in this suit in the trial court and in the Court of Civil Appeals of Texas grew out of the interpretation of a written contract, signed in New Mexico, to be performed in New Mexico, and performed so far as it was performed in New Mexico. No statute of New Mexico bearing upon the contract was alleged or offered in evidence. Plaintiff in Error contended that in any difference between the parties growing out of the contract, the decision of its Engineer of Maintenance and Way should be in the nature of an award, final and conclusive. Plaintiff in Error contended that similar contracts had been interpreted by the Supreme

Court of the United States to confer such power upon an engineer, and had been held valid. The trial court and the Court of Civil Appeals interpreting the contract in this case held that it did not confer upon the engineer the authority to determine whether Plaintiff in Error, defendant in the trial court, had breached the contract in the particulars complained of. The Texas courts did not hold the contract invalid; they interpreted it different to the contention of plaintiff.

(The attention of the court is respectfully invited to the erroneous use of the word "Statute" in the Second Assignment of Error on p. 234 of the Tr. of Record. It is not contended by Plaintiff in Error that there was any *statute* in New Mexico bearing upon the subject.)

FIRST PROPOSITION OF LAW.

That the decision of a State Court of last resort places a different construction upon a contract than that placed upon a similar contract by the Supreme Court of the State where the contract was made and to be executed, does not present a Federal question as a denial of full faith and credit to the laws of such other state.

AUTHORITIES.

Penn. R. Co. vs. Hughes, 191 U. S., 477; Law Ed., Bk. 48, p. 268; Johnson vs. New York Life Ins. Co., 167 U. S., 491; 47 L. Ed., 273.

ARGUMENT.

The sole ground of error relied upon in this case is that the courts of the State of Texas, construing a contract signed in New Mexico and to be executed in New Mexico and which, so far as it was executed, was executed in New Mexico, did not place that interpretation upon certain clauses of that contract which would have been placed thereon had this cause been before the Supreme Court of the United States for interpretation. It is not contended by plaintiff in error that any statute of New Mexico was disregarded or held void by the Texas courts. Neither is it contended that there had

been any decision by the courts of New Mexico upon the question involved in the interpretation of the contract out of which this suit grew. But it is contended by plaintiff in error that in certain suits involving similar questions to those raised in this case that the Supreme Court of the United States had placed a different interpretation upon the contracts. That the Supreme Court of the United States was the court of last resort for causes arising in the Territory of New Mexico and that, therefore, the decisions of the Supreme Court of the United States are the laws of New Mexico and that, therefore, the courts of Texas in failing to follow the decisions of the United States Supreme Court in construing a contract made, partly performed and breached in New Mexico, have denied full faith and credit "to the public acts, records and judicial proceedings of" that territory.

The defendant below, plaintiff in error, introduced in evidence to establish the laws of New Mexico, the opinions in the following cases rendered in the Supreme Court of the United States. (See Tr. of Record pp. 98-100.)

Kihlberg vs. The United States, 97 U. S., 398; Sweeney vs. The United States, 109 U. S., 618; Martinsburg & Potomac R. R. Co. vs. March, 114 U. S., 549; Chicago & Santa Fe Railroad vs. Price, 138 U. S., 185; United States vs. William Rovison, 9 Pet., 371; United States vs. Gleason, 175 U. S., 588; Mercantile Trust Co. vs. Henesey, 205 U. S., 298.

Several of the authorities above listed were relied upon by the defendant in error, plaintiff in the court below, and we entertain no doubt that should this cause come to be heard upon its merits in this court that it will be found that the ruling of the trial court and the Court of Civil Appeals of Texas were in strict accord with the decisions of the United States Supreme Court as well as the Supreme Court of Texas, but we submit with confidence that conceding the ruling of the Texas Courts to be directly contrary to the ruling of this court, it would not raise a Federal question within the meaning of Section 709 of the Revised Statutes of the United States.

SECOND PROPOSITION OF LAW.

It is clearly apparent from the record that there is no question in this case involving a decision against the validity of an authority exercised under the United States, it being nowhere shown that any authority exercised by the United States or by any officer thereof, was set up or in any way involved in the decision of the case, or such authority in any way called into question.

AUTHORITIES.

Tulliride P. T. Co. vs. Rio Grande W. Co., 175 U. S., 645; 44 L. Ed., 305; Millinger vs. Hartupee, 73 U. S., 258; 18 Law Ed., 829.

STATEMENT.

In the trial of this case, no question was ever raised or claim made in the trial court or the Court of Civil Appeals as to the validity of any treaty or statute or of any authority exercised under the United States.

THIRD PROPOSITION OF LAW.

Decisions of the state courts in respect to matters of general law cannot be reviewed by the Supreme Court of the United States on the theory that the law of the land is violated, because the state court's conclusions are not absolutely free from error.

AUTHORITIES.

Sayward vs. Denny, 158 U. S., 180; 39 L. Ed., 941.

FOURTH PROPOSITION OF LAW.

The question of the true construction to be placed upon the contract involved in this suit depended wholly upon general rules of law and in no degree upon the constitution, laws or treaties of the United States and a disregard by the courts of the State of Texas of the opinions of the Supreme Court of the United States rendered in other, though similar cases,

would not give the Supreme Court of the United States jurisdiction to review the judgment of the state court.

AUTHORITIES.

Giles vs. Little, 134 U. S., 650; 33 L. Ed., 1062; Winnonac Ry. Co. vs. Town of Plainview, 143 U. S., 371; 36 L. Ed., 191; DeSessaure vs. Gailord, 127 U. S., p. 216; 32 Law Ed., 125.

FIFTH PROPOSITION OF LAW.

The Supreme Court of the United States cannot, as an appellate tribunal, reverse the decision of a state court because that court has held that the provisions of a contract upon which the rights of the parties depend, does not preclude one of the parties from having his rights under the contract adjudicated in the courts instead of referring them to an arbiter named in the contract, because the Supreme Court of the United States might hold otherwise if the case were properly before it; and the Supreme Court will not assume jurisdiction in such cases on the pretence that the decision has impaired the obligation of contract.

STATEMENT.

The only Federal question sought to be raised by the plaintiff in error in its application for writ of error to the Supreme Court of the State of Texas, was that the Court of Civil Appeals had erred in overruling appellant's 34th, 35th, 41st, 54th, 55th, 56th, 57th and 64th assignments of error "wherein and in each of them appellant sought to have the trial court try the case according to the laws of New Mexico, where the contract was made and was to be performed, as to claims by appellees for damages which had not been allowed by the engineer in charge to whose judgment such parties are bound by the contract to be governed unless his decisions were impeached by appropriate pleading of fraud, mistake or unrecoverableness, and in which rulings the trial court and Court of Civil Appeals erred in that it thereby refused to give full faith and credit to the public acts and laws of the Territory of New Mexico, and by such ruling in effect *impaired the obligation of contract.*"

The charges referred to and upon which this assignment was based, were charges by which the plaintiff in error sought to have the jury trying the case instructed by the trial court, not only "that the contract was intended by the parties to be performed in the Territory of New Mexico and that in so far as it has been performed, has been within the Territory of New Mexico and that under the laws of the Territory of New Mexico the agreement above referred to is a valid and binding agreement upon both the parties to the suit," but also in effect that the Engineer of Maintenance and Way was the sole arbiter under the contract of all the matters in dispute and that any matters that might have been determined by him, inclusive of the questions of the sufficiency of the plant furnished by the plaintiff in error and of the coal and water furnished by it to meet the requirements of the contract, could not be litigated in the courts unless fraud or mistake was shown. In other words, by these requested instructions, plaintiff in error undertook to have the court charge the jury, not only that the case was being tried under the laws of the Territory of New Mexico *but that under the laws of the Territory of New Mexico*, applicable to the contract, the Engineer of Maintenance and Way was the sole arbiter of the question as to whether or not the plaintiff in error had in fact complied with its contract and had done that which it was required to do by its terms. (See application for writ of error to the Supreme Court of the State of Texas, pp. 194 to 212, inclusive, of the printed transcript of record, and especially the tenth paragraph on p. 211.) The ground of error stated in said tenth paragraph, complaining that the action of the court in refusing the above charges was a violation of the provisions of the laws and constitution of the United States requiring "full faith and credit to be given in each state to the public acts of other states and territories, and forbidding the passing of any laws impairing the obligation of contract," was the only ground stated in the application to the Supreme Court of Texas attempting to raise a Federal question.

SIXTH PROPOSITION OF LAW.

The Supreme Court of the United States cannot entertain jurisdiction of a case from a state court because the judgment of that court impairs or fails to give effect to a contract. The judgment must give effect to some state statute or state constitution, which impairs the obligation of contract.

AUTHORITIES.

Knox vs. Exchange Bank, 12 Wall., 379; 20 L. Ed. 414; Murdock vs. Memphis, 20 Wall., 590; 22 L. Ed., 429; McManus vs. O'Sullivan, 91 U. S., 578; 23 L. Ed., 390; Bolling vs. Lersner, 91 U. S., 594; 23 L. Ed., 366; Brown vs. Atwell, 92 U. S., 329; 23 L. Ed., 512; New York Life Insurance Company vs. Hendren, 92 U. S., 286; 23 L. Ed., 709; Crossley vs. New Orleans, 108 U. S., 105; 27 L. Ed., 667.

SEVENTH PROPOSITION OF LAW.

Whether the Court of Civil Appeals of Texas was correct in its construction of the contract between the parties, and correct in holding that under the terms of the contract plaintiff in error's Engineer of Maintenance and Way was not authorized to determine the question as to whether or not the plaintiff in error was required to furnish a crushing plant of a certain capacity and had failed to do so, and in holding that it was not intended by the contract to confer upon said Engineer of Maintenance and Way the right to pass upon and determine that question, and in refusing the instructions requested by plaintiff in error on that subject, is immaterial; because such holding was in no sense a denial of that "full faith and credit" due to the laws of the Territory of New Mexico, and such holding of said courts will not be assumed to be in any way in conflict with the rules of law laid down by the United States Supreme Court in its opinions cited in evidence; and further that the trial court refused to give the special charges asked by the plaintiff in error, instructing the jury peremptorily that under the laws of the Territory of New Mexico, its Engineer of Maintenance and Way was the sole arbiter as to the construction of the contract and as to

whether or not plaintiff in error, under the terms of the contract, was required to furnish a plant of a certain capacity, will not be assumed as in any sense a refusal by the court to give full faith and credit to the laws of New Mexico or to the decisions of the United States Supreme Court offered in evidence.

AUTHORITIES.

Johnson vs. New York Life Insurance Company, 187 U. S., 491; 47 L. Ed., 273; Banholzer vs. New York Life Insurance Company, 178 U. S., 402; 44 L. Ed., 1124.

STATEMENT.

It will be seen by referring to the special charges asked by the plaintiff in error and refused by the court (pp. 80-82 of the printed transcript) that in every instance there was coupled with the instruction, requested and refused, telling the jury that the contract was to be performed within the Territory of New Mexico and that the laws of New Mexico would govern, the further charge that under the laws of New Mexico, as applied to the contract, the plaintiff's Engineer of Maintenance and Way was the final arbiter of the question as to whether or not the plaintiff in error had complied with its part of the contract and had furnished a plant of the capacity required of it by the contract.

EIGHTH PROPOSITION OF LAW.

In order that the Supreme Court can take jurisdiction because of a Federal question, the Federal question must necessarily be involved in the decision so that the state court could not have given the judgment or decree which it passed without deciding it.

AUTHORITIES.

Crowell vs. Randell, 10 Pet., 391; 9 L. Ed., 467; Armstrong vs. Athens County Treasurer, 16 Pet., 285; 10 L. Ed., 966; Hoyt vs. Thompson, 1st Black, 518; 17 L. Ed., 65; Grand Gulf, &c., Ry. Co. vs. Marshall, 12th Howard, 164; 13 Law

Ed., 938; Snell vs. City of Chicago, 152 U. S., 191; 38 Law Ed., 408.

STATEMENT.

By referring to the charges requested by plaintiff in error and refused by the court, upon which a Federal question is sought to be predicated (pp. 80-82 of the printed transcript of record) it will be readily seen that no Federal question was in fact thereby raised or called to the attention of the court, and that in refusing these charges there was no holding by the court, either that the contract was not to be performed under the laws of New Mexico or that the laws of New Mexico were not paramount and controlling as to the construction which should be given the contract.

This is made clearly apparent by the opinion of the Court of Civil Appeals, especially in sub-paragraphs 1 and 2, found on pp. 130 and 131 of the printed transcript of record, and paragraph 21, found on page 138 of the printed transcript of record, wherein the Court of Appeals construes the contract as not contemplating that the defendant's Engineer of Maintenance and Way should be an arbiter to determine the question whether the contract provisions in issue were breached and assess the damages occasioned by such breach, and justifies the refusal of these charges on that ground.

We call attention to the fact that the Court of Civil Appeals further said in its opinion, in paragraph 21 just referred to "Nor do we think that either of said special charges suggested any law upon the subject to which they pertain, which required the court to prepare another charge thereon and submit it to the jury."

NINTH PROPOSITION OF LAW.

The Supreme Court of the United States has no jurisdiction to revise the views or principles held by the state court where there is nothing in the record to show that the court supposed that protection under the United States Constitution from its rulings was claimed or that such ruling as made involved a decision against a right specially set up under that instrument.

AUTHORITIES.

Sayward vs. Denny, 158 U. S., 180; 39 L. Ed., 941; Hoyt vs. Thompson, First Black, 518; 17 Law Ed., 65.

TENTH PROPOSITION OF LAW.

To give the Supreme Court of the United States jurisdiction under Sec. 709 of the Revised Statutes because of a denial by the state court of some right, title, privilege or immunity claimed under the constitution, or some law or treaty of the United States, it must appear on the record that such title, right, privilege or immunity claimed under the constitution, or any treaty or statute of the United States, was specially and distinctly set up at the proper time and in the proper way.

AUTHORITIES.

Speis vs. Ill., 123 U. S., p. 131; 31 L. Ed., p. 80; Chicago, etc., Ry. Co. vs. McGuire, 196 U. S., 128; 49 L. Ed., 413; Jacobi vs. Alabama, 187 U. S., p. 133; 47 L. Ed., 106; Laycon vs. Missouri, 187 U. S., 356; 47 L. Ed., 214; Maxwell vs. Newbold, 18 Howard, 515; 15 L. Ed., 506.

ELEVENTH PROPOSITION OF LAW.

Where the Federal question has been raised in neither the trial court, nor in the State Court of Appeals, when the latter court is called upon to pass upon the case on review and reverse or affirm the judgment of the trial court, but the question is raised for the first time in a petition for a writ of error to the Supreme Court of the State, it comes too late, where the petition is denied by the Supreme Court without a written opinion.

AUTHORITIES.

Mutual Life Insurance Company vs. McGraw, 118 U. S., 291; 47 L. Ed., 480; Huber vs. Jennings-Haywood Oil Syndicate, 201 U. S., 641; 50 L. Ed., 901; Herold vs. Frank, 191 U. S., 558; 48 L. Ed., 302; Hughes vs. Kepley, 191 U. S., 557; 48 L. Ed., 301; Wakefield vs. Tassell, 192 U. S., 601; 48 L.

Ed., 583; *Bank of Commerce vs. Wiltzie*, 189 U. S., 505; 47 L. Ed., 921.

TWELFTH PROPOSITION OF LAW.

Under the laws and rules of practice governing the Supreme Court of the State of Texas, that court has no right to, and will not consider errors assigned or rights set up for the first time in the application for a writ of error addressed to it, such errors so claimed, not having been called to the attention of the Court of Civil Appeals by appropriate assignments of error by a motion for a re-hearing in the Court of Civil Appeals distinctly pointing out the error complained of, unless the error complained of is fundamental.

AUTHORITIES.

The first clause of Rule 1 of the Rules of the Supreme Court of the State of Texas then and now in force, provides that "Applications for writs of error shall embrace specific assignments of error confined to the points of law presented in the motion for a re-hearing in the Court of Civil Appeals."

So. Pac. Co. vs. Haas, 85 Tex., 401.

STATEMENT.

No claim was made or called to the attention of either the trial court or the Court of Civil Appeals that there was drawn in question the validity of any authority exercised or right, privilege or immunity claimed by appellant under the constitution or laws of the United States; nor that the same had been decided erroneously against the appellant; nor that the trial court or the Court of Civil Appeals, by its ruling was denying or had denied to appellant any right, privilege or immunity guaranteed to it by the constitution and laws of the United States, requiring full faith and credit to be given to such laws in every court within the United States as it had by law or usage in the courts of New Mexico.

Plaintiff in error claimed no right under any statute of the Territory of New Mexico. There was no statute of the Territory of New Mexico of any character, either plead or proved. The trial court did not decline to try the case under

the laws of the Territory of New Mexico nor to consider the contract in the light of the decisions of the United States Supreme Court, but merely declined to give charges instructing the jury that the plaintiff's Engineer of Maintenance and Way, under the laws of the Territory of New Mexico, was the sole arbiter of the questions involved in the suit and his decisions final and binding as to these questions. (See charges tendered and refused upon which the writ of error is predicated, pp. 80-82, of the printed transcript.)

The Court of Civil Appeals upheld the trial court in the refusal of these requested instructions, on the grounds stated in its opinion (see paragraphs of the opinion of the Court of Civil Appeals above referred to, appearing on pp. 130 and 131 of the printed transcript of record.)

The Supreme Court of the State of Texas denied and refused the application for a writ of error without a written opinion, and without a written opinion overruled plaintiff in error's motion for a re-hearing on the denial of the application for a writ of error. (See p. 218 of the printed transcript of record.)

ARGUMENT.

There was nothing before either the trial court or the Court of Civil Appeals to indicate or suggest that the plaintiff in error contended that the denial of the instructions upon which it now seeks to predicate a Federal question, and the refusal of these courts to hold that the Engineer of Maintenance and Way was, under the contract, the sole arbiter and judge of the question as to whether or not the plaintiff in error had complied with the obligations devolving upon it under the contract, and especially those requiring it to furnish a plant of a certain capacity, was in any way violative of the rights now asserted by plaintiff in error as a basis for its writ of error herein.

It will be remembered that no statute of the Territory of New Mexico bearing in any way upon contracts of this character or the rights or duties of the parties thereunder, was either plead or proved; and it was not contended by the defendant in error, nor held by either the trial court or the

Court of Civil Appeals that the state court would have the right to disregard a statute of the Territory of New Mexico, had there been one bearing upon the questions involved in the case; nor was it contended or held that the state courts should disregard the opinions of the Supreme Court of the United States bearing upon the questions involved, that is to say the proper construction to be placed upon a contract to be performed in whole or in part within the Territory of New Mexico. It seems plainly apparent that the refusal by the trial court to give the charges asked, instructing the jury that the Engineer of Maintenance and Way was the final arbiter of the rights of the parties, was in no sense a refusal to recognize the laws of New Mexico, as interpreted by the Supreme Court of the United States, as valid and binding.

We think also it is apparent from the record that the rulings of the trial court and the Court of Civil Appeals were to the effect, that construing the contract between the parties in the light of the general authorities, the defendant in error's Engineer of Maintenance and Way was not made the arbiter of the question as to whether or not the plaintiff in error had fulfilled its part of the contract. This was not a disregard by the court of the laws of New Mexico nor a disregard of those laws as interpreted by the Supreme Court of the United States. It is plain from the record that the plaintiff in error contended that a proper construction of the contract, placed in its Engineer of Maintenance and Way the right to decide whether or not the plaintiff in error had complied with its part of the contract and had furnished such a plant and such coal and water as was required by its terms, the defendant in error contending that the Engineer of Maintenance and Way was not made the arbiter of these matters by the contract and that if the plaintiff in error had breached its contract by reason of its failure to perform, in these respects, they could resort to the courts for redress.

As to whether or not the trial court and the Court of Civil Appeals regarded the opinions of the Supreme Court, introduced in evidence, as not deciding the precise questions before them, or regarded these opinions as not authoritative for other reasons, does not appear from the record, but we

think it should be assumed, if any presumption is to be indulged, that the state courts adopted the former view and that these opinions were not disregarded. There is absolutely no ground for the contention that the state courts held the opinions of the Supreme Court not authoritative and conclusive as to questions actually considered and passed upon by that court. There is nothing in the opinion of the Court of Civil Appeals in this case to indicate any disregard by that court of the laws of New Mexico or of the decisions of the United States Supreme Court in construing the contract; nor does it appear that the Court of Civil Appeals in any way failed or refused to give effect to the laws of New Mexico. The Court of Civil Appeals in its opinion (as appears on p. 131 of the printed transcript of record herein) in construing those provisions of the contract conferring authority upon plaintiff in error's Engineer of Maintenance and Way said: "The right committed to the defendant's Engineer of Maintenance and Way to impose penalties upon the plaintiff for acts or omissions specified in the contract, was necessarily predicated upon the assumption that the defendant would so perform its part of the contract as not to cause the defaults on plaintiff's part for which said penalties were prescribed, and all defaults incurred would be attributable to plaintiff's own fault or failure to do that which defendant had, in accordance with its part of the contract, furnished them the stipulated means and instruments of performing.

"The question of the capacity of the crushing plant and the quality and the sufficiency of the coal and water to successfully operate the plant to the end it was furnished plaintiff by the defendant, were not by the contract submitted to the engineer for decision. These matters, as we have seen, were conditions precedent to the contract which it was incumbent upon the defendant to perform in order that plaintiffs might carry out their part of the contract."

Again that Court, in its opinion, in holding that the trial court properly refused to instruct the jury that plaintiff in error's Engineer of Maintenance and Way was the arbiter under the contract of the questions which the defendant in error was seeking to have adjudicated, said: "It was not

contemplated by the contract that the defendant's engineer, as an arbiter, should determine the question whether a material provision in the contract was breached by either party and assess the damages occasioned by such breach, nor were such matters submitted to or determined by such engineer. If they had been, neither party would have been bound by the award, for they were such as to only be determined by a court of competent jurisdiction. Therefore, there was no error in the court's refusing special charges, Nos. 43, 45 and 47, which are the subject of the 34th, 35th and 36th assignments, nor do we think that either of said special charges suggested any law upon the subject to which they pertain, which would require the court to prepare another charge thereon and submit it to the jury."

It would appear from this language of the Court of Civil Appeals that that court in overruling plaintiff in error's assignments, complaining of the court's failure to instruct the jury that the Engineer of Maintenance and Way was made under the contract, the final arbiter of the matters being litigated and instruct the jury that the rights of the parties under the contract were to be determined by the laws of New Mexico, was acting upon the theory that the contract construed in the light of the general authorities, was not susceptible of the construction contended for by the plaintiff in error and did not thereby hold, as contended by it, that the laws of New Mexico and the decisions of the United States Supreme Court were not entitled to full faith and credit.

The record discloses that in the plaintiff in error's application for a writ of error to the Supreme Court of Texas, it for the first time (in its tenth ground, appearing on p. 211 of the transcript of record) asserted a Federal question. By the tenth paragraph referred to, the plaintiff in error complained that the trial court, in refusing the special charges referred to, had declined to give full faith and credit to the public acts and laws of the Territory of New Mexico, and by such ruling impaired the obligation of contract in violation of the provisions of the laws and constitution of the United States requiring full faith and credit to be given in each state to the public acts of other states

and territories and forbidding the passing of laws impairing the obligations of contract.

The only complaint made by the plaintiff in error, in either the District Court or the Court of Civil Appeals, in any way touching upon or hinting at this question, was by a plea setting up "that there was in the Territory of New Mexico, at the time when the same (the contract between the parties) was made, and has since been and now is, a certain *non-statutory and unwritten law* to the effect that agreements, such as that between said plaintiff and defendant, are valid and binding and that neither of the parties to such contract and agreement, have any right of action in a cause based thereon in the covenants and agreements therein contained, but must rely for a decision of such rights and claims on the determination thereof by the Chief Engineer or Engineer of Maintenance and Way, and that said contract was, under the laws of the Territory of New Mexico, valid and enforceable, and this defendant alleges that said plaintiffs should not be allowed to maintain their cause of action, etc." (See printed transcript of record p. 40.) And further, by the special charges appearing on p. 223 of the printed record herein, sought to have the court instruct the jury that under the contract between the parties, the decision of the Engineer of Maintenance and Way was conclusive of any dispute that might arise between the parties as to such agreement "relative to or touching upon the same," and that each of the parties to such agreement waived any right of action or suit or other remedy in law or otherwise, by virtue of the covenants of said agreements and agreed that the decision of the Engineer of Maintenance and Way should be in the nature of an award be final and conclusive as to the rights of the parties. That the contract was intended by the parties to be performed in the Territory of New Mexico and that in so far as it had been performed in the Territory of New Mexico, etc. These charges, requested by the plaintiff in error, ignored entirely the claim of defendant in error that under the contract the defendant in error was bound to furnish a plant of the capacity agreed upon and specified in the contract and that a proper construction of the contract did

not place in the Engineer of Maintenance and Way the right or power to decide this question.

There was no pleading, charge or motion sufficient to raise the question now sought to be raised. It was not made apparent that plaintiff in error was seeking to raise any question as to any title, right, privilege or immunity under the constitution or laws of the United States, or to raise any question as to any authority exercised under the United States until it filed its application for a writ of error to the Supreme Court of the State of Texas, after its motion for a re-hearing in the Court of Civil Appeals had been overruled.

We understand the law to be that the plaintiff in error, in order to avail itself of a Federal question, must by some method distinctly call that matter to the attention of the trial court, or at least to the State Court of Appeals, and there seek to have an adjudication of that question. Not having raised the Federal question in either the trial court or the Court of Civil Appeals, it was then too late to raise the question upon application for a writ of error from the Supreme Court of the State to the intermediate Court of Appeals, and the Supreme Court of the United States, under such circumstances, will not take jurisdiction unless the State Supreme Court in refusing the writ of error, has by a written opinion passed upon the Federal question.

It was said by this court, in *Oxley Stave Company vs. Butler Company*, 166 U. S., 648; 41 L. Ed., 1149, and has been re-affirmed by this court in many cases, that when the jurisdiction of this court is invoked for protection against the final judgment of the highest court of a state, of some title, right, privilege or immunity secured by the constitution and laws of the United States, it must expressly appear, or by necessary intendment from the record, that such right, title, privilege or immunity was "specially set up or claimed" under such constitution or laws and the jurisdiction of this court cannot arise in such case from inference, but only from averment so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a Federal right.

Again it was said (in the *Capitol National Bank vs.*

First National Bank, 172 U. S., p. 425; 42 L. Ed., p. 502) that if the denial by the state court of a right, under a statute of the United States is relied on as justifying this court's interposition, before it can be held that the state court thus disposes of a Federal question, the record must show, either by the words used or by clear and necessary intendment therefrom, that the right was specifically claimed or a definite issue as to the possession of the right must be distinctly deducible from the record without an adverse decision of which, the judgment could not have been rendered.

In the case of *Spies vs. Ill.*, 123 U. S., 131, 31 L. Ed., 80, this court said: "To give us jurisdiction under Sec. 709 of the Rev. Stat. because of the denial by a state court of any title, right, privilege or immunity claimed under the constitution or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time and in the proper way. To be reviewable here, the decision must be against the right so set up or claimed. In other words, it must appear from the record that the rights set up or claimed were denied by the judgment or that such was its necessary effect in law. It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a Federal nature, and the statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference."

These propositions are sustained by authorities too numerous to mention. The right, in order to be available, must be set up distinctly in the proper court below, and as said in the case of *Layton vs. Missouri*, above cited, "The appellate jurisdiction of the Supreme Court contemplates a review only of the matters submitted to be examined and determined by the *trial court*. Hence it is well settled that this court has no jurisdiction of an appeal on the ground that a constitutional question is involved, unless the question was raised and submitted to the trial court." Where this is not the case, the writ of error will be dismissed.

We believe it is manifest that the assignments of

error upon which the writ of error is based do not raise a Federal question; that no Federal question was, in any way suggested in either the trial court or the Court of Civil Appeals; that neither the decision of the trial court nor the Court of Civil Appeals necessarily involved the questions now sought to be raised or for that matter, any Federal question, and that the decision of the case in these courts did not turn upon or involve any right, title, privilege or immunity claimed or guaranteed under the constitution or laws of the United States, or any authority exercised thereunder; that no right, title, privilege or immunity, under the constitution and laws of the United States was set up or claimed; that there was no decision by the state courts against such authority, right, title, privilege or immunity and no denial to plaintiff of any right, title, privilege or immunity, to which it may be entitled by virtue of the constitution and laws of the United States; that no Federal question of any character was sought to be raised until plaintiff in error filed its petition to the Supreme Court of the State of Texas for a writ of error, when by the tenth paragraph of the application, plaintiff in error set up that it had sought to have the trial court try the case according to the laws of New Mexico but that the court in refusing to give certain special charges, had "refused to give full faith and credit to the public acts and laws of the Territory of New Mexico and by such ruling in effect impaired the obligation of the contract under which appellees, as well as appellants, claimed, in violation of the provisions of the laws and constitution of the United States requiring full faith and credit to be given in each state to the public acts of other states and territories and forbidding the passing of any laws impairing the obligation of contract."

We submit that the record shows there is no Federal question involved in this cause.

THIRTEENTH PROPOSITION OF LAW.

In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at

a rate not exceeding 10 per cent., in addition to interest, shall be awarded upon the amount of the judgment.

AUTHORITIES.

Rule 23 of the Supreme Court of the United States.

ARGUMENT.

We submit with confidence that the Record in this cause discloses that the Writ of Error was sued out herein, without probable cause; that the alleged Federal question is wholly frivolous and has been frequently and uniformly decided adversely to the contention of plaintiff in error; that the writ of error issued herein has greatly delayed the proceedings on the judgment of the inferior court and that defendants in error are justly entitled to their damages for the delay.

Wm. Davis
Philip H. Frey
James M. Gozwin
Richard F. Burges
 Counsel for WILLIAM EICHEL and ADAM WEIKEL,
 Defendants in Error.

EL PASO & SOUTHWESTERN RAILROAD COM-
PANY *v.* EICHEL & WEIKEL.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 252. Argued December 3, 1912.—Decided January 13, 1913.

This court cannot review a judgment of the State court under § 709, Rev. Stat., on the ground of denial of a Federal right, privilege or immunity unless the same was specially set up or claimed in the state court.

Questions of the *lex loci contractus* and of the *lex loci solutionis* are questions of general law that frequently arise in litigation and do not, unless specially so claimed, constitute the setting up of a Federal right or privilege.

In this case the insistence of plaintiff in error that his rights under a contract were to be determined according to the law of a different State, did not amount to claiming that full faith and credit was

denied to the law of another State so as to give a basis for a review of the judgment by this court under § 709, Rev. Stat.

Where, as in this case, it appears that the state court based its decision upon the interpretation of the contract and not upon the law of another State, there is no basis for review by this court on the ground of failure to give full faith and credit to the acts of another State. The assertion of a Federal right in an unsuccessful application to the highest court of a State to grant a writ of error to a lower court of that State raises no question reviewable in this court. Writ of error to review 130 S. W. Rep. 922, dismissed.

THE facts, which involve the jurisdiction of this court to review a judgment of a state court on writ of error under § 709, Rev. Stat., are stated in the opinion.

Mr. A. B. Browne, with whom *Mr. Alexander Britton*, *Mr. Evans Browne* and *Mr. W. C. Keegin* were on the brief, for plaintiff in error.

Mr. Philip W. Frey, with whom *Mr. Waters Davis*, *Mr. J. M. Coggin* and *Mr. Richard F. Burges* were on the brief, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Writ of error sued out under § 709, Rev. Stat., to review a judgment of the Court of Civil Appeals, that being the highest court of the State in which a decision in the suit could be had because the Supreme Court of Texas denied a petition for writ of error to review the judgment in that court.

The action was brought by defendants in error in the District Court of El Paso County, Texas, to recover damages for certain alleged breaches of contract committed by the railroad company, now plaintiff in error. Damages were recovered accordingly, and the judgment awarding them was affirmed by the Court of Civil Appeals. 130 S. W. Rep. 922. Whether the jurisdiction of this court is

properly invoked depends upon whether any Federal right or immunity was duly set up or claimed by the plaintiff in error in the state court, and there overruled.

The controversy in suit arose out of a written contract between the parties whereby the railroad company, owner of a railroad located in the then Territory of New Mexico, for the purpose of procuring crushed stone ballast from a quarry owned by it and situate in the Territory, agreed to provide a crushing and quarry plant capable of producing 1000 cubic yards of ballast in ten hours, with the necessary appurtenances and equipment, including coal, water, and railroad cars, and the defendants in error agreed that with and from said plant they would quarry, crush, prepare and deliver ballast at the rate of 750 cubic yards for each day's work, at prices fixed by the contract. The contract contained a clause providing that monthly payments to the extent of 90 per centum of the engineer's estimates should be made to the defendants in error during the progress of the work, with a final payment at the completion of the whole work contemplated, "upon the certificate of the Company's Engineer of Maintenance of Way that the Contractor has acceptably discharged all of his obligations under this agreement in conformity to the following specifications." Also the following, appended to the specifications: "The decision of the Company's Engineer of Maintenance of Way shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; and each of the parties hereto waives any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants herein, so that the decision of said Engineer of Maintenance of Way shall, in the nature of an award, be final and conclusive on the rights and claims of said parties."

The plaintiffs, in their petition, set up numerous grounds of action. So far as they were submitted to the jury they

were summarized by the trial judge as follows: Plaintiffs alleged that the defendant failed to furnish a crusher plant of the capacity agreed to be furnished, that the plant actually furnished was of much less capacity, and that instead of furnishing coal and water of a quality reasonably sufficient and suitable for the purpose of operating the plant and quarry, the defendant furnished coal and water entirely unsuitable for that purpose; that by reason of the incapacity of the plant and the unsuitability of the coal and water, plaintiffs were prevented from producing the quantity of ballast required by the contract, and which they had a right to produce and would have produced but for the defendant's alleged defaults; that the cost of the ballast actually produced was greatly enhanced by reason of said defaults, and plaintiffs were finally compelled to shut down, and abandon their contract; wherefore they sought to recover the retained ten per cent., certain penalties that had been exacted under the terms of the contract for failure to produce ballast, and certain freight charges against them deducted by defendant for goods transported over its own line; and also to recover for the enhanced cost of production of the ballast actually produced and for the profits which they alleged they would have made under the contract if it had been fairly performed by the defendant.

The defense, so far as now pertinent, was, that the contract was made and intended to be performed in the then Territory of New Mexico and was made with reference to the laws in force therein, and that there was in that Territory, at the time of the making of the contract and at the time of the suit, "a certain non-statutory and unwritten law, to the effect that agreements such as those herein specially referred to (meaning the agreement respecting the arbitrament of the engineer), are valid and binding, and that neither of the parties to such contract and agreement has any right of action in a cause based

thereon, but must rely for a decision of such rights and claims on the determination thereof by such engineer."

This defense was set up by exceptions to the plaintiffs' petition, and by special pleas thereto. The cause proceeded to trial, whereupon the defendant introduced, for the purpose of showing the laws of New Mexico at the time the contract was made, certain decisions of this court, to wit: *Kihlberg v. United States*, 97 U. S. 398; *Sweeney v. United States*, 109 U. S. 618; *Martinsburg & Potomac R. Co. v. March*, 114 U. S. 549; *Chicago, Santa Fe &c. R. Co. v. Price*, 138 U. S. 185; *United States v. Robeson*, 9 Pet. 319, 327; *United States v. Gleason*, 175 U. S. 588; *Mercantile Trust Co. v. Hensey*, 205 U. S. 298. At the conclusion of the evidence the defendant, among other special charges, requested the court to instruct the jury that the contract sued on provided that the decision of the company's Engineer of Maintenance of Way should be final and conclusive in any dispute between the parties relative to the agreement, and that each of the parties thereby waived any right of action or other remedy at law, or otherwise, by virtue of the covenants of the agreement, and expressly agreed that the decision of the engineer should, in the nature of an award, be final and conclusive on the rights of the parties; that the contract was intended to be performed in the Territory of New Mexico, and that under the laws of that Territory the agreement referred to was a valid agreement, binding upon both parties; that under the laws of the Territory and the provisions of the contract made in pursuance thereof, the matters and things in dispute in this action should have been submitted to the decision of the engineer, and because they had not been so submitted and acted upon by him, no judgment could be rendered against the defendant arising out of the matters in dispute; and also, that if the jury believed from the evidence that the engineer had theretofore decided and determined that the plant

in question was of the capacity warranted, and the coal and water were serviceable for the purpose for which they were intended, and that all allowances which plaintiffs could be entitled to by reason of delay on account of the lack of coal and water, or the bad character of coal and water, had been in fact allowed by the engineer, and the plaintiffs had been paid therefor by the defendant, then the plaintiffs would not be entitled to recover in this action by reason of the incapacity of the plant or the character and quality of the coal and water furnished, unless the jury should further believe that in making such decisions and awards the engineer acted in fraud of the plaintiffs' rights, or in such ignorance thereof as to amount in law to a fraud.

The trial court refused to give these instructions, and on the contrary charged the jury that if the crusher plant installed by the defendant company did not have the stipulated maximum capacity, or if the water or coal was of a quality not reasonably suitable for the operation of the plant, and if by reason of either of these causes the production of ballast by the plaintiffs was reduced beneath 750 cubic yards per day, and beneath that which the plaintiffs would otherwise have actually produced with reasonable care, management, and diligence, and if plaintiffs suffered loss and damage by reason thereof, then the defendant would be liable for such loss and damage as was the proximate result of its failure to furnish a crusher plant of the guaranteed capacity, or to furnish reasonably suitable coal or reasonably suitable water.

In the opinion of the Court of Civil Appeals, the action of the trial court was sustained upon the following reasoning: "The question of the capacity of the crushing plant, the quality and sufficiency of the coal and water to successfully operate the plant to the end it was furnished plaintiffs by defendant, were not by the contract submitted to the engineer for his decision. These matters,

as we have seen, were conditions precedent to the contract which it was incumbent upon the defendant to perform in order that plaintiffs might carry out their part of the contract, and if defendant failed to perform them, and such failure proximately caused default of plaintiffs for which the penalties were assessed by the engineer, such assessments were wrong, and the amount paid by plaintiffs, if not voluntarily, are recoverable by them." And again: "It was not contemplated by the contract that defendant's engineer as an arbiter should determine the question whether a material provision in the contract was breached by either party and assess the damages occasioned by such breach; nor were such matters submitted to or determined by such engineer. If they had been, neither party would have been bound by his award; for they were such as could only be determined by a court of competent jurisdiction. Therefore, there was no error in the court's refusing special charges Nos. 43 and 45 (being those to which reference has been made), nor do we think that either of said special charges suggested any law upon the subject to which they pertain, which required the court to prepare another charge thereon and submit it to the jury."

We have sufficiently indicated the general character of the controversy, the issues of fact and of law that were raised therein, and the disposition that was made of them. Whether this court has jurisdiction to review the resulting judgment depends, of course, upon whether in the course of the proceedings the plaintiff in error "specially set up or claimed" any "right, privilege, or immunity" under the Constitution or any statute of the United States, within the meaning of § 709, Rev. Stat.

It is contended that the decisions of this court that were introduced as evidence of the law of New Mexico in effect conferred upon the plaintiff in error the privilege and immunity of being protected against any action to recover

damages, except such as the engineer had decided were due to defendants in error; and that the failure of the state court to give effect to those decisions or to properly construe and apply the unwritten law of the Territory as established thereby, presents a Federal question as much as if an act of Congress had been disregarded.

But assuming (without, however, conceding) that the plaintiff in error was entitled to a "right, privilege, or immunity" in the premises, derived from the Federal Constitution or laws, the question remains whether such right, privilege, or immunity was "specially set up or claimed." An examination of the record discloses that while it was repeatedly insisted that the rights of the parties under the contract should be determined according to the law of the Territory of New Mexico, that such law was to be ascertained from the reported decisions of this court, and that under those decisions the clauses that gave finality to the decision of the company's engineer were valid and binding, and that the plaintiff's action was foreclosed thereby, it was not suggested that in so insisting the plaintiff in error was asserting or relying upon any right, privilege, or immunity derived from the Constitution or laws of the United States.

Questions of the *lex loci contractus* and of the *lex loci solutionis* are questions of general law that frequently arise in actions respecting written agreements. *Von Hoffman v. Quincy*, 4 Wall. 535, 550; 9 Cyc., Title "Contracts," 664-674; 2 Pars. Cont. *567, *582-*585; Story, Conf. Laws, §§ 231, 232, 241, 242, 270, 272, 280, etc. To insist, in such a litigation, that the matter ought to be controlled by the law of the place where the contract was made and to be performed, rather than by the law of the forum, is no more than to insist that the controversy shall be determined according to the rules of law properly applicable thereto.

The points raised by plaintiff in error that are now re-

lied upon as an assertion of Federal rights were brought to the attention of the trial court and of the Court of Civil Appeals like any other of the multitude of questions that were raised in those courts; and, so far as appears, the decision in both courts proceeded not in disregard of any Federal right asserted or suggested, nor even in disregard of the decisions of this court or the authority of those decisions as laying down the law of the Territory of New Mexico, but rather upon the ground that, upon the proper interpretation of the contract, the clause that was cited as giving finality to the decision of the company's engineer was not applicable to the questions in controversy.

We therefore deem it clear that plaintiff in error did not lay the foundation for a review under § 709, Rev. Stat., either in the trial court or in the Court of Civil Appeals.

After the denial by the latter court of a motion for rehearing, application was made to the Supreme Court of Texas for a writ of error, to the end that that court might review the judgment. In this application alleged Federal rights were for the first time asserted, it being assigned for error that the trial court and the Court of Civil Appeals had "refused to give full faith and credit to the public acts and laws of the Territory of New Mexico," etc., etc. The application was considered and refused, and a motion for a rehearing thereon was overruled. But since the Court of Civil Appeals is the highest court of the State that rendered a judgment reviewable here (*S'anley v. Schwalby*, 162 U. S. 255, 269; *Bacon v. Texas*, 163 U. S. 207, 215) the assertion of Federal rights in an unsuccessful application to the Supreme Court of the State for a writ of error raises no question that is reviewable in this court.

Writ of error dismissed.